Parks Canada Parcs Canada

THE SOURCE OF NATIVE CLAIMS IN CANADA

Charles N.D. Hotzel

May, 1979

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PREFACE

This paper is the second in a series of occasional papers dealing with issues in national park management. The series is intended for all Parks Canada staff who are involved in developing or implementing national park policies.

The present paper discusses the basis of native land claims in various parts of Canada. It does not provide any comprehensive answers, nor does it outline a policy or regulation for national parks officers in dealing with questions of native land claims. It does, however provide a useful insight into the legal and jurisdictional arena in which native land claims are operative.

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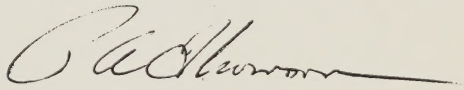

P.A. Thomson
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AUTHOR'S FORWARD

The present paper is a rather brief and perhaps superficial attempt to examine the basis of native land claims in various parts of Canada. By and large, native people until recently, had little success in arguing these claims at law. It is suggested that there are clear indications that the judicial attitude to native land claims is changing, albeit slowly. In addition there are clear indications of the changing stance of both provincial and federal governments towards land claims. Only one decided case R. v Rider has considered a claim to rights within a national park thus the other cases can only be considered to provide a general guide to the types of arguments which could be raised in various regions of Canada. It should be remembered however, that there are significant differences in the potential for success in federally administered lands such as national parks when compared to other Crown lands, which are within provincial jurisdiction.

THE AUTHOR

The author has a master's degree in earth sciences and experience in a variety of research projects in the Canadian arctic and sub arctic dating back to 1970. At the time this paper was written, he was a first year law student at the University of Calgary. Other experience includes the preparation of independent assessments of proposals made by the Northern Pipelines Group to the Berger Commission relating to slope stability problems and collaboration with Ken East of the Natural Resources Division of Parks Canada in the preparation of "Shoreline Erosion, Point Pelee National Park", published by the Natural Resources Division in 1976.

ABSTRACT

Questions relating to aboriginal and treaty rights claimed by Canada's native people have, during the past decade, achieved increasing prominance. In the courts, an increasingly liberal interpretation of treaty rights is a facet of developing law in this area. In addition, aboriginal rights have been confirmed as part of Canadian law. As a result, the federal government has entered into negotiations with native groups. These are aimed primarily at defining the limits of rights for the future, providing compensation for any rights lost in those regions still subject to federal jurisdiction over private property (i.e. Yukon and N.W.T.). Parks Canada managers should be aware of the types of claim which may be raised in various parts of the country and the manner in which the courts have previously dealt with similar claims.

In general the country may be divided into two parts those areas where claims will be based primarily on treaty and those areas where claims will be based on aboriginal rights. In the former category are the prairie provinces and much of Ontario; in the latter, British Columbia, Quebec, Labrador, the Yukon Territory and much of the Northwest Territories. The Maritimes and Newfoundland provide anomalies. For the Maritimes, treaties exist which have never been confirmed as the basis of claims, but equally have not been totally rejected. In this region, if the treaties were ultimately rejected, it appears that there is still a basis for claims under the doctrine of aboriginal rights. For Newfoundland, no treaties were never signed with the indigenous Beothuk, who were in any case exterminated in the latter part of the 18th century and the early part of the 19th century by settlers in the area. Under these circumstances there appears to be no basis for native claims in Newfoundland.

National parks are federal enclaves, to which federal laws apply; thus all case law interpreting the effect of federal laws on native people is applicable there. In general it is suggested that case law indicates that federal laws are binding on native people, other rights being overriden. Under these circumstances it is suggested that the National Parks Act applies equally to native and non-native people. In the national parks reserves in the Yukon and the Northwest Territories the rights given by Section 11 of the National Parks Act are not totally clear and depend on interpretation of the word "traditional" by the courts.

It is likely that land claim settlements in the Yukon and the Northwest Territories will ultimately include provisions for the managed use of parks resources by native people. To this end the experiences gained in Wood Buffalo and Pukaskwa Parks may be important. It seems, however, that more data relating to productivity, carrying capacity etc. are required to enable the introduction of management schemes which will ensure operations compatible with the legal mandate of Parks Canada under Section 4 of the National Parks Act.

SOMMAIRE

Les questions relatives aux droits aborigènes et aux droits relevant de traités revendiqués par les autochtones du Canada ont pris une ampleur croissante au cours de la dernière décennie. Devant les tribunaux, l'interprétation des droits acquis par traité se fait de plus en plus libérale et ceci est un des aspects de l'évolution du droit dans ce domaine. De plus, on a démontré que les droits aborigènes faisaient partie intégrante du droit canadien et, en conséquence, l'État a entrepris des négociations avec les associations autochtones. Ces négotiations ont pour but de définir l'étendue de ces droits pour l'avenir et d'apporter des indemnités en compensation des privilèges perdus dans les régions qui sont encore sous juridiction fédérale (c'est-à-dire le Yukon et les Territoires du Nord-Ouest). Les gestionnaires de Parcs Canada devraient connaître les types de revendications susceptibles d'être présentées dans les diverses parties du pays et la façon dont les tribunaux ont disposé de causes semblables par le passé.

De façon générale, il est possible de diviser le pays en deux secteurs: les régions où les revendications reposent sur des traités et les régions où les revendications portent sur les droits indigènes. Les provinces des Prairies et une grande partie de l'Ontario appartiennent à la première catégorie. La Colombie-Britannique, le Québec, le Labrador, le Yukon et une grande partie des T.N.-O. appartiennent à la deuxième catégorie. Les provinces Maritimes et Terre-Neuve présentent des anomalies. Dans les Maritimes, il existe des traités qui n'ont jamais été ratifiés en tant que fondement des revendications mais qui n'ont jamais été par ailleurs complètement rejetés. S'il s'avérait que ces traités soient rejetés dans cette région, il semble qu'il sera encore possible de fonder les revendications sur le principe des droits aborigènes. A Terre-Neuve, il n'y a jamais eu de traités avec les indigènes, les Beothuk, qui ont été exterminés par les colons de la région dans la deuxième partie du XVIII^{e} siècle et au début du XIX^{2}.

Les parcs nationaux sont des enclaves fédérales où s'appliquent les lois fédérales. Tout droit jurisprudentiel qui interprète l'incidence des lois fédérales sur les peuples autochtones est donc applicable. L'on pense généralement que le droit jurisprudentiel indique que les lois fédérales sont exécutoires, en ce qui concerne les autochtones, et l'emportent sur toutes les autres lois. Ainsi donc, nous sommes d'avis que la Loi sur les parcs

nationaux s'applique aussi bien aux autochtones qu'au reste de la population. Dans les réserves constituées par les parcs nationaux du Yukon et des T.N.-O., les droits accordés en vertu de l'article 11 manquent de clarté et dépendent de l'interprétation du mot "traditionnel" par les tribunaux.

Il est vraisemblable que le règlement des revendications foncières au Yukon et dans les T.N.-O. finira par inclure des clauses permettant aux autochtones d'utiliser de façon rationnelle les ressources des parcs. De ce point de vue, l'expérience acquise à Wood Buffalo et à Pukaskwa s'avère très important. Il semble cependant qu'il faudra réunir un grand nombre de données sur le productivité, les possibilités d'utilisation etc. avant que l'on puisse définir des plans directeurs permettant une exploitation compatible avec le mandat légal de Parcs Canada en vertu de l'article 4 de la Loi sur les parcs nationaux.

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1.1 Introduction

Over the past two decades, questions concerning native status, the rights of native people and the reasons for their obvious socio-economic deprivation have increasingly become a focus of attention. During that time, native rights movements have developed cohesive organizations, a degree of political unity, an awareness of the value of publicity and widespread public acceptance. Concomitant with these developments a vast amount of legal research has been undertaken by academics, often financed by the federal government in an attempt to define the extent of the legal claims of Canada's native peoples. In the wake of such research a number of cases, designed to test the law and the attitude of the courts, have been litigated with varying success.

In Calder et. al. v A.G. B.C.[1], the Nishga people of British Columbia claimed native title to the Naas valley in northern British Columbia on the basis of rights guaranteed under the royal proclamation of 1763.[2] Ultimately, although the Nishga claim was rejected, six of the seven judges specifically indicated an acceptance of the prinicple of native title in Canadian law. Three found that under the circumstances such title as existed could be and had been extinguished before Confederation, by implication and without compensation. Three judges, having accepted that the title could be based on the royal proclamation, did not need to consider whether it had been extinguished by the colonial administration, since this was beyond the power of the administration. In any event the Calder case appears to provide an unqualified acceptance of the concept of Indian title as an aspect of Canadian law. This decision, which came in the wake of a speech by Prime Minister Trudeau indicating that the federal government would not recognize native (aboriginal) rights, has clearly influenced the course of subsequent negotiations between government and native organizations. It appears to have convinced the federal government that native rights do exist and that a settlement of such rights must ultimately be negotiated.

In Re Paulette[3] Mr. Justice Morrow of the Supreme Court of the Northwest Territories held that native

title was an interest in land which could be registered against the title to the land under the Land Titles Act.[4] Although the decision was reversed on appeal, a verdict was subsequently upheld by the Supreme Court of Canada. The decision, however, did not deny the existence of native title, but merely refused to accept that a caveat could be issued against the title to unpatented crown land which did not fall under the provisions of the Land Titles Act.

In a third case, Kanatewat v James Bay Development Corporation,[5] the petitioner sought an injunction to prevent damage to the fauna and flora in the James Bay area, an area to which the petitioner claimed native title and which was vital in providing food for the petitioner and other native people. Mr. Justice Marouf, in granting a temporary injunction, refused to accept the argument of the respondent, that the corporation would suffer enormous financial losses if the project were halted, and that on the balance of convenience it should be allowed to continue. In handing down judgment, the learned judge noted that the right of the petitioner was "clear and certain", and based on occupancy which could be measured in centuries. The decision was quickly reversed by the Appeals Division of the Quebec Superior Court, but not before the stoppage it had resulted in large financial losses for the developer. The reversal by the Appelate Division, however, highlights one of the major problems in this type of situation; the reluctance of any court to halt a project of this magnitude because of the amount of investment capital involved, and the possibility of severe economic repercussions.

By and large these cases suggest a number of trends which are liable to affect future litigation relating to native land claims.

1. The willingness to accept native claims in the lower courts, with the promotion of judges (Mr. Justice Morrow has already been elevated to the Supreme Court of Alberta), will eventually mean that Indian claims will meet with greater success in superior courts.

2. Many questions relating to native rights remain unresolved, and cases are being decided on technicalities without closing the important claims routes which may be used in the future.

3. Native groups, because of their willingness to go to court, are now influencing the federal government to offer settlement of claims which, even 10 years ago, would have seemed most unlikely to succeed.

However, it is necessary to recognize that ultimately the solutions to problems of native rights are political. Previously, native people had little influence on legislative decisions relating to their welfare. Government agencies in general adopted a paternalistic attitude in considering native problems and attributed most problems to the failure of native people to integrate into the wage earning economy. More recently there seems to be some recognition of the fact that attempts to integrate native people rapidly into white society are doomed to failure, and that native people can probably best contribute to cultural and economic life within the framework of their traditional skills and experience.

Nothing has been made clearer by the Mackenzie valley pipeline hearings than the fact that the native way of life in northern Canada is inseparably bound to use of the land and utiliziation of renewable resources in those areas of Canada not yet developed. If the land is taken from the people or their use of the land is restricted to such a degree that it is incompatible with their former lifestyle, the social structure of their society is destroyed and symptomatic increases in alcoholism and crime quickly appear.

There is moreover, abundant evidence that native people are aware of the problems and their roots, and are consequently not prepared to allow the land to be taken. They are not prepared to integrate into a society which they see as inferior and destructive, nor passively allow their cultural values to be further eroded. It is within this framework that Parks Canada must find a solution to allow the dedication for national parks of large areas of land still used by native people.

Perhaps, however, the apparent conflict of interest is an illusion, since essentially both Parks Canada and many native people are striving towards the same end - preservation of the natural environment.

1.2. The Legal Basis of Aboriginal Title

In recent years native people in areas not covered by land surrenders (and sometimes in areas which apparently have been surrendered),[6] have argued that they have certain rights to use the land which arise from the fact that they have occupied and used the land since time immemorial. If such a doctrine is part of Canadian law, it is so presumably through incorporation into the law of Canada at the time of Confederation in 1867. In order to assess the validity of such claims it is therefore necessary to examine whether the concept of "aboriginal title" was part of English law at the time of Confederation.

The earliest recorded recognition of title rights of the indigenous people of the American continent is found to be contained in the writing of Francisco de Vitoria,[7] who in 1532 following initial contacts between Spanish adverturers and native people of the New World, gave lectures at the University of Salamanca. He concluded that neither a papal grant of the land to Spain nor the fact that the native people were not Christians could destroy their title to the land. Subsequently this conclusion was reinforced by the bull Sublimis Deus of 1537 in which Pope Paul III stated that Indians were to be treated as other men, free to enjoy liberty and to own property.

Whether the papal bull was in fact the source of adoption of the concept of aboriginal rights in English law is unknown since in 1534, Henry VIII abrogated papal authority. Nevertheless, when Sir William Blackstone[8] wrote his commentaries on the English common law, he recognized three ways in which title to newly discovered territory could be acquired:

a) By right of discovery - if the land was deserted and uncultivated

b) By right of conquest - if the land was cultivated

c) By cession - if the land was cultivated

It is evident from various documents and correspondence dating from the early period of colonization that these aspects of the law were recognized by colonists who frequently tried to purchase the land on

which they settled from the indigenous inhabitants; a procedure frequently encouraged by the colonizing authority. Chief Justice Marshall of the United States Supreme Court, in one of the leading cases concerning "Indian title" in the United States, suggested that the practice of purchasing title from the Indians developed during a period when the settlers were vastly outnumbered by the native inhabitants and purchase agreements were expedient.[9] Nevertheless he found that the practice was incorporated as part of the law of the Thirteen Colonies after the American War of Independence. In considering the argument that title to the land was recognized between colonizing powers by right of discovery, Chief Justice Marshall suggested that the conventions entered into by colonizing European nations merely provided exclusive right to negotiate to acquire title from the indigenous population without interference. Discovery alone did not in itself give title where the land was already populated.

In the case of Johnson v Mackintosh[10] the Chief Justice admitted that the Indians were rightful owners of the soil with a legal right to retain possession, but denied them complete sovereignty indicating that title was necessarily incomplete since title was limited by the fact that aboriginal inhabitants could only alienate the land through sale or cession to the recognized colonizing authority.

The theory which emerged from these cases and which has subsequently received recognition in Canadian courts suggests that on discovery of the new territory legal title accrued to the discovering nation subject to the right of occupancy and use of the land by the original inhabitants. The position proposed by the Chief Justice in these cases is thus far less than status as independent nations. The reluctance to treat Indian nations as nations in the European sense arose from the fact that such recognition would have greatly impeded settlement. Thus the course adopted was ultimately derived from practice, expedience and policy considerations which arose at the time, rather than from pre-existing legal doctrine.

1.2.1 The Nature of Aboriginal Title

It is suggested that aboriginal title in Canada essentially follows the model proposed by Chief

Justice Marshall vesting the fee in the state and the right of use and occupancy of the land in the native people until extinguished. Unfortunately land ownership and occupancy and ownership in common law do not correspond to concepts understood by native people. As recently as 1959[11] a Royal Commission investigating the need to establish reservations in the Northwest Territories found that Indian people involved had no concept of any difference between ownership of the land and its use. Moreover, the communal ownership practiced by many native groups contained no individual proprietary right; but group rights had no counterpart in the common law system. Faced with this situation, the Privy Council in the case of St. Catharines Milling and Lumbering Co v The Queen[12] used the concept of "usufruct" derived from Roman law to describe aboriginal title. Thus aboriginal title has been defined as the right to take the fruits of the land as distinct from title to the land (dominum).[13] The conclusions of the St. Catharines Milling Case[14] suggests that aboriginal title consists of a right to harvest the renewable produce of the land, whilst ownership is vested in the state.

If aboriginal title is viewed in this context, it is evident that the right to harvest is limited in two ways:

a) A usufruct does not permit equitable waste,[15] this would include a prohibition on mineral excavation. Thus the native people possessing a usufruct could not remove soil, rock, mineral ore or hydrocarbons.

b) The harvest is limited to a level which allows total regeneration of the renewable resource.

It is suggested that the concept of usufruct does not therefore completely comply with traditional aboriginal use of the land. There can be little doubt that Indians in Canada and the United States used and traded in minerals, including copper and obsidian, for at least 1000 years before European settlement in North

America.[16] In the case of renewable resources there is more support for the usufruct analogy, as there is abundant evidence that use of these resources was designed to promote constant renewal through conservative use; and conservative use was embodied in tradition.

1.3 Legal Recognition of Aboriginal Title in Canada

Evidence suggests that English authorities did recognize Indian territorial claims prior to the issue of the royal proclamation of 1763.[17] For example, in 1756 the secretary of Indian affairs, writing to Sir William Johnson, stated that the Six Nations Indians had recently acknowledged British sovereignty, but he suggested this was not intended to be a legal cession but an act based on expediency and the desire to keep the French out. The Indians, he stated, wanted neither English or French on their lands.

By the 1760s friction between the settlers moving westward in the United States and the Indians with whom they were coming into contact was so severe that the British feared an alliance between the Indians and French who had established forts on the Allegheny and Ohio River systems. As a consequence, the British authorities issued two royal proclamations by which they undertook to reserve large areas, which were at that time not settled by colonists for Indian hunting grounds (see Fig. 1). Elsewhere, where settlement of colonists had already occurred, the Crown reserved to itself the right to extinguish Indian title. The effect of the document is twofold. Firstly it recognizes "Indian Territories", i.e. lands to which Indians clearly have title. Secondly, by indicating that in future only the Crown may extinguish title in areas which are already settled, it also recognizes that there is a title to be extinguished in these areas also.

The royal proclamation however, raises two problems:

a) Is the royal proclamation of 1763 the sole source of aboriginal title?

   if not:

b) What is the effect of the royal proclamation?

1.3.1 Is the Royal Proclamation the Sole Source of Title?

Cumming[18] suggests that there are two partially overlapping theories which support aboriginal title, which exists quite separately from the proclamation. The first, lex loci, is part of the common law tradition under which the law of the local inhabitants of a newly occupied territory is incorporated in English law as applicable in the area. In such circumstances the law so adopted continues in force until specifically changed by the sovereign legislative authority.

In Calder v A.G. B.C.[19] evidence before the court indicated a sophisticated system of territorial recognitition existed amongst the native people before colonization which amounted to local law. Similar systems could probably be demonstrated elsewhere.[20] Where areas which are recognized as traditional lands remain ungranted and Indian title has not been extinguished, if lex loci applies, the pre-European recognition of land holding should be incorporated into the legal system.

As an alternative to the lex loci principle, a second approach to the problem suggests that recognition of Indian title over a period of 350 to 400 years in British North America must constitute recognition as a common law principle of long standing. This seems to be the attitude adopted by Chief Justice Marshall in the case of Johnson v Mackintosh.[21] The Chief Justice appears to suggest that Indian title was recognized from the earliest period of settlement in North America, and that the principle based on long standing occupancy by indigenous people is a fundamental principle of law.

In the leading Canadian case on aboriginal title, Calder v A.G. B.C.,[22] Mr. Justice Judson, whilst rejecting the claim of the Nishga Indians to title based on the royal proclamation states at p. 7:

> I do not take these reasons to mean that the proclamation was the exclusive source of Indian title....

Later he states:

> I say at once that I am in complete agreement with the British Columbia courts in this case that the royal proclamation has no bearing upon the problem of Indian title in British Columbia.

Mr. Justice Hall in the Calder case points to the fact that Indian title had been recognized in treaties with the Indians. At page 64, he suggests that there can be no possible grounds for denying the existence of aboriginal title. Surely, he says, "Canadian treaties, made with such solemnity on behalf of the Crown were intended to extinguish the Indian title. What other purpose did they serve?"

Lysyk (1973)[23] cites the fact that the Dominion Lands Act,[24] by which the federal government might dispose of timber and mineral rights, was inapplicable in lands where Indian title had not been extinguished. Similarly, although the Hudson's Bay Company made few treaties with native people when in 1870 it transferred Rupert's Land to the Canadian government,[25] the agreement included the following provision:

> Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government.

Clearly the Hudson's Bay Company believed that compensation claims for land required for development were to be expected.

Later in 1912 the federal parliament enacted two boundary extensions relating to Quebec and Ontario.[26] Each contained provisions whereby the province became responsible for obtaining land surrenders where any existing title had not previously been extinguished.

According to Mr. Justice McGillivary of the Appellate Division of the Supreme Court of Alberta in the case of R. v Wesley,[27]

government policy has not been dictated by inclusion or non-inclusion under the terms of the royal proclamation. He pointed out that lands expressly excluded from the provisions, specifically those which formed Rupert's Land, had subsequently been the subject of treaty negotiation.

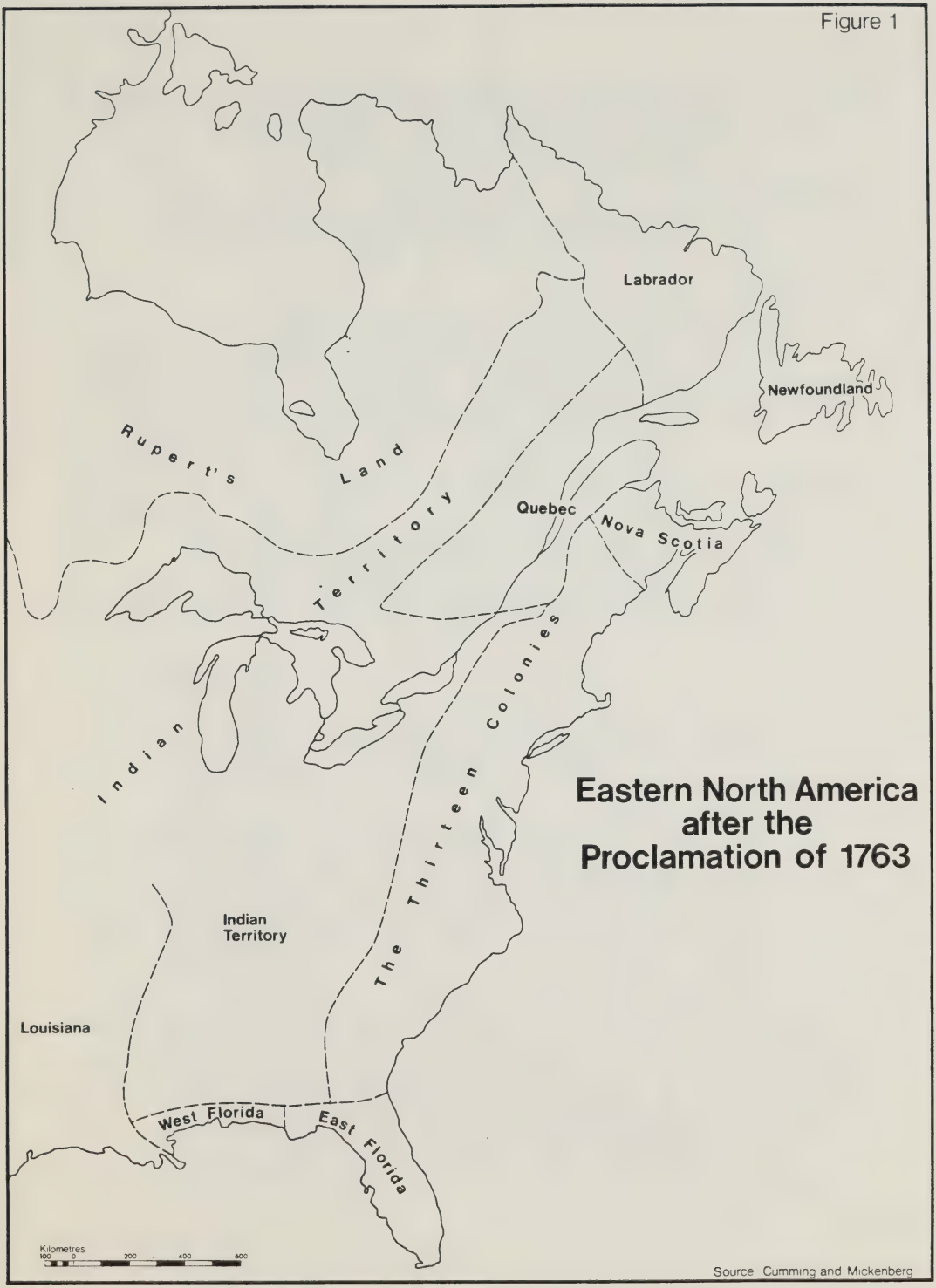
It is suggested that there is abundant evidence that aboriginal title does not need to be confirmed by the effect of the royal proclamation to be vlaid. Evidence suggests that the recognition of the title aboriginal peoples was consistently a part of British policy prior to Confederation and that since that time has been a part of the policy of the Canadian government. Suggestions that the foundation of aboriginal title must lie in the proclamation appear to be of recent origin.

1.3.2 What is the Effect of the Royal Proclamation of 1763

It has been suggested that aboriginal rights exist quite independently of the royal proclamation of 1763 and that the proclamation is merely confirmatory of Indian rights involved. Nevertheless the applicability of the Royal Proclamation in different areas is a question which has been repeatedly raised, as though it were necessary to confirm Indian title in these areas. In the case of R. v Sikyea,[28] Mr. Justice Johnson of the Supreme Court of the Northwest Territories stated at p. 66-67.

> The Indian inhabiting Hudson's Bay Company lands were excluded from the benefit of the proclamation and it is doubtful, to say the least, if the Indians of the western part of the Northwest Territories could claim any rights under the proclamation, for these lands were terra incognita and lay to the north and not to the west of the sources of the rivers which fall into the sea from the west or northwest.

Figure 1



Eastern North America after the Proclamation of 1763

Source Cumming and Mickenberg

The proclamation was also discussed in Calder v A.G. B.C.,[29] where Mr. Justice Judson stated at page 7 when discussing the St. Catharines Milling case:

> There can be no doubt that the Privy Council found that the proclamation of 1763 was the origin of Indian title.

He goes on to discuss at length the geographical limits of the area affected by the royal proclamation and concludes that it gave Indians no rights in northern British Columbia. This seems to have influenced decisions in subsequent cases. In the case of The Queen v Dennis and Dennis,[30] the court found that it was not bound by the Calder case to find that northern British Columbia and the southern Yukon Territory were in 1763 terra incognita; in the case of The Queen v Kruger and Manual[31] the Court of Appeal of British Columbia again discussed the effect of the royal proclamation this time in the context of S.88 of the Indian Act which states in part:

> Subject to the terms of any treaty and any other act of the Parliament of Canada all laws of general application from time to time in force in the province are applicable to and in respect of Indians[32]...

In this case which concerned closed season hunting, the defense appears to have contended that the British Columbia Wildlife Act under which the charge was laid, was overriden by the royal proclamation. In reversing an aquittal in the lower court, the Court of Appeal held:

a) The royal proclamation was not a treaty,

b) Was not an act of the Parliament of Canada

Under these circumstances the British Columbia Wildlife Act was held to apply as a law of general application not subject to the exceptions.

The prominence given to the royal proclamation is somewhat surprising since in both the Calder case[33] and The Sikyea case[34] the court, even though rejecting the proclamation as the source of Indian title in the areas in question, accepted that title existed, nonetheless, unless extinguished. Probably in cases when the dispute relates to provincial legislation, the discussion relates primarily to the force of the proclamation as a statutory instrument and an exception to the provision of S.88 of the Indian Act. The decision in the Kruger and Manuel case[35] suggests however, that the courts may be prepared to uphold provincial laws of general application whether the royal proclamation is held to apply to the area in question or not.

The question of whether the royal proclamation applies to all Canadian native people, and if not, which ones are not affected, appears unresolved. Mr. Justice Hall of the Supreme Court of Canada in the Calder case argued convincingly that northern British Columbia was not terra incognita in 1763 and the court in that case remained divided 3-3 on the question.

1.4 Conclusions

There appears to be a trend towards recognizing aboriginal rights in all parts of Canada quite independently of the royal proclamation. It is suggested that such a trend is strongly supported by both historical records and early Canadian case law on this point. It is further suggested that judicial decisions which rejected Indian land claims on the basis that Indian title to the areas involved was not guaranteed under the royal proclamation of 1763 may in the future be successfully avoided by using an alternative basis for claims. Thus the stance of Prime Minister Trudeau, when he stated there would be no recognition of Indian title, would probably not be upheld by the courts. It seems however that government policy on this point has reversed, and since about 1973 the federal government has been negotiating with native people on questions of aboriginal rights in the Canadian north. This appears to lend support to the proposition that the federal government now accepts that land claims settlements must be negotiated before the land can be developed.

2. Native Rights Accruing to Different Native Groups

The fact that certain priviledges accrue to one group in society either on the basis of either treaty or heredity suggests the need to distinguish between the various groups who might advance claims.

2.1 Status Indian

A status Indian under the Indian Act[36] is defined as a person entitled to be registered under the Act. The qualificiations for registration are contained in S.11. Status is hereditary, being passed through the male line. A status Indian who can show that the title to lands on which his ancestors lived has not been extinguished must be considered to have a claim either on the basis of the royal proclamation or the common law doctrine of aboriginal rights.

2.2 Inuit

The Inuit are recognized as Indians under the Indian Act.[36a] The effect of the royal proclamation of 1763 on the Inuit also appears uncertain. On the basis of the fact that many Inuit traditionally lived within areas included within the boundaries of Rupert's Land, these were specifically excluded from the effect of the royal proclamation. Other Inuit such as those who lived on Banks Island and Victoria Island, which were definitely terra incognita in 1763, were also excluded from the effect of the proclamation. A third group, those living on Baffin Island and the Labrador coast, were outside Rupert's Land but since the land involved was not terra incognita, and probably does not qualify as beyond the sources of the rivers which fall into the Atlantic Ocean from the west and northwest, it may thus have been included under the terms of the proclamation. However, any general attempt to base Inuit aboriginal rights on the royal proclamation, other than those suggesting that the proclamation must be viewed as a charter of native rights appears to involve tenuous arguments. There is little doubt, however, that on the basis of occupation since time immemorial, a claim to aboriginal rights by the Inuit has the same force as that of other aboriginal peoples. With the exception of one agreement made between the Moravian Mission in Labrador, there have been no Inuit land surrenders.

2.3 Métis

The Métis are people of mixed Indian and European blood who frequently lived exactly the same lifestyle as the Indians themselves. Métis were frequently offered different settlement terms when treaties were negotiated. In many cases they were given the option of accepting the same terms as the Indian people of the area. This usually involved a small cash payment, a land allocation and the promise of further annual payments. Alternatively, they could accept a settlement on the basis of their larger initial payment of scrip which could be exchanged for a land allocation larger than that given to the Indians. Accepting designation as a Métis in this way extinguished all alternative claims to land rights and the right to further payments.

It seems that there has never been any serious attempt to deny that Métis have title claims which must be extinguished. The claim of Métis to rights was recognized in the Manitoba Act[37] and later in the Dominion Lands Act.[38] One of the problems relating to Métis claims is the fact that whereas the Indian claims were settled on a band area system, the claims of Métis people were individual settlements. Once an Indian band's claims had been extinguished by the chief, title to the whole territorial area was extinguished; but because the Métis had no group structure, title had to be extinguished on an individual basis. Where this was not done descendants may have good claims. Thus, in some areas, although all aboriginal title relating to Indians may have been extinguished, individual Métis may still be recognized as having a valid claim to title under federal statute.[39] This situation may exist in the Treaty 8 and 11 area which covers part of the Northwest Territories where a large Métis population lives. Berger[40] notes that only 172 Métis took scrip payments under the terms of Treaty 11.

As stated earlier, many treaties were signed by Métis who chose to come under the terms of the Indian settlement rather than take scrip. The rights of these Métis have always been considered to be the same as Indian signatories. In 1944 the Indian Affairs Branch attempted to remove certain Métis from the Treaty 8 lists on the basis that their fathers or grandfathers had been white. A judicial inquiry which examined this problem concluded that Métis rights had

always been conceded on the basis of native blood and that the government had always attempted to deal with Indians and Métis at the same time. As a result of the inquiry Métis who had been removed from the treaty list were placed on the list again.

The suggestion that some Métis have the rights of full blood Indians is supported by both R.V. Howson[42] and R.V. Mellon.[43] It was held in both cases that people of mixed blood who lived in an essentially traditional manner were Indians under the Indian Act.

It must be concluded that except where Métis signed treaties extinguishing their rights as Indians, or took scrip in full settlement of their claims, Métis retain unextinguished title which will be upheld by the courts to the same degree as that of Indians in the same area. Recently[44] it has been suggested that even in areas where title was extinguished by treaties, many Métis people do not accept the payments made as having extinguished their title to the land.

2.4 Non-Status - Enfranchised Indians

In some cases, native people have chosen to become enfranchised (i.e. give up the benefits and burdens of status under the Indian Act).[44a] The possibility of claims for aboriginal title by this group has been suggested by Cumming and Mickenberg.[45] They suggest that the decision to become enfranchised and the effect which this has under the provisions of the Indian Act has no bearing on aboriginal rights. They point out that Inuit are specifically excluded from the terms of the Indian Act but are not similarly excluded from claiming aboriginal rights. This seems to suggest that the right to claim is based purely on racial heritage. Alternatively, however, there seems to be a strong basis for suggesting that such claims must be based on continuing use of the land; thus someone who is not a member of the community, irrespective of his racial heritage, cannot claim the benefit. This introduces social criteria qualifying the right to claim. Clearly, many non-status (enfranchised) Indians no longer live on the land and do not use the communal usufruct. In such cases, it is suggested their claim to aboriginal title is probably doubtful.

In the case of rights given under treaty, the situation may be somewhat different. Treaties were

essentially agreement between the representatives of the Crown and the representatives of Indian bands, under the terms of Section 12 of the Indian Act, a person who is enfranchised is not entitled to be a registered band member. Thus an individual becoming enfranchised would cease to be a band member and hence would cease to be subject to the obligations and benefits of the treaty, and would be subject to the laws governing all other Canadian citizens.

This suggestion appears to be reinforced by the Mellon[46] and Howsen[47] cases and the report of the MacDonald Commission.[48] These all found it necessary to use social as well as racial criteria to define Indian status. Most recently this problem was addressed in the Alaska Highway Pipeline Inquiry,[49] where it was suggested that the charter group under the settlement should be persons of ¼ Yukon Indian descent born between 1898 and 1941, with no minimum degree of racial descent for descendants. In addition, however, individuals regarded as eligible by the credential committee of the community in which they resided could be enrolled irrespective of racial origin. This group is potentially larger than any, depending on social and racial criteria, since it seems to admit all whom the native community recognize as community members, and lends support to the suggestion that racial descent is not determinative of rights.

2.5 Treaty Indian

Treaty Indians are those whose ancestors were signatories of treaties by which aboriginal rights were extinguished. These include the Indians of the prairies, northern Ontario, parts of the Northwest Territories and southern Ontario. In many cases the treaties specified that the Indians, in addition to money payments and land allocations, also received the right to hunt and fish on unoccupied crown land. Subsequently, in some cases, rights given under treaty have been subject to modification by statute enacted by both federal and provincial authorities. Many of the cases relating to Indian rights, which have been heard by the courts during the past 60 years, have involved attempts to define the relationship of statutory enactments and preexisting rights based on treaty or common law.

The result of numerous cases concerning rights under treaty suggest:

a) In most cases in which federal legislation has unilaterally modified rights under treaty, the right of the federal government to modify treaty rights has been upheld.[50]

b) In many but not all cases involving modification of treaty rights by provincial legislation, treaty rights were upheld on the basis that only the federal government can legislate on matters of Indians and Indian lands under Section 9(24).[51] However, the recent trend appears to reverse this by finding increasingly that laws considered are laws of general application and therefore apply under S.88 of The Indian Act.

3. Indian Rights - A Regional Breakdown

3.1 The Basis of Title Claims in Law

According to Lysyk,[52] Europeans entering North America may claim to have legally extinguished title of the indigenous people in several ways. He suggests the three most probable methods are:

a) by conquest

b) by treaty, cession

c) by competent legislation

Notably absent from the test is any suggestion that legal title can be acquired by right of discovery. It now seems well established that no such claim can be made since the land was clearly inhabited by peoples who had their own codes of conduct and rules. In areas peopled by French immigrants, New France and Acadia, it has been suggested that French law did not accept that the indigenous people had title. Thus in areas which were settled by the French, they claimed automatically to acquire by right of law.

In English Canada there was little of the strife which characterized settlement of the interior of the United States in the 18th and 19th centuries. Consequently, it is unrealistic to suggest that there is any claim to title by conquest. As a consequence, it seems well established that, unless Indian title can be shown to have been extinguished by treaty or statute, it must be recognized as a burden on Crown title. Two theories providing for the extinguishment of native title were advanced by the Supreme Court of Canada in the case of Calder v. A.B. B.C.[52a] each preferred by three members of the court. The first, suggested in judgment of Mr. Justice Judson, was that title could be extinguished by prerogative acts of the legislative authority. The alternative theory espoused by Mr. Justice Hall suggested the burden could only be extinguished with the consent of the indigenous native occupants. In the case of R. v. Isaac[52b] Chief Justice MacKeigan, of the Appeal Division of the Nova Scotia Supreme Court, indicated a preference for the theory advanced by Mr. Justice Judson, but based this solely on the policy reason that there had been few surrenders in Nova Scotia. It is suggested that there is a strong

argument that this point remains undecided. Even in areas where treaties were signed, the treaties themselves often contained provisions whereby the Indian people were guaranteed some degree of continuing use of the land so long as it remained unoccupied.

A cursory examination of the problem of Indian title indicates that there is great variation from place to place in the nature and basis of Indian claims. It is suggested therefore that the problem must be examined on a regional basis.

3.2 Quebec

The province of Quebec developed in four phases by boundary extension. As a result of this historical development the basis of claims is not uniform.

3.2.1 Pre 1788 Quebec and New France

The area of New France was limited by the royal proclamation of 1763 to an area immediately adjacent to the St. Lawrence as shown in figure 2, though this was clearly not the extent of French occupation which extended into Manitoba, the Northwest Territories and northern Ontario. Under the French regime there was little recognition of the possibility of Indian title, and it has been argued that there was no such concept in French law. Cumming and Mickenberg[53] point out, however, that a number of important documents do contain the suggestion that French authorities recognized Indian sovereignty. Probably the relatively sparse French settlement, combined with a relatively sparse nomadic Algonquin Indian population and coexistence based on fur trading, produced a situation in which this never emerged as a problem which had to be considered in law. Certainly in the Hudson's Bay Company lands this never became a problem so long as the company was interested primarily in fur trading.

If the French did not in fact recognize the existence of Indian title in law, Cumming and Mickenberg[54] suggest that this does not destroy Indian rights except to the extent where rights were directly extinguished by acts

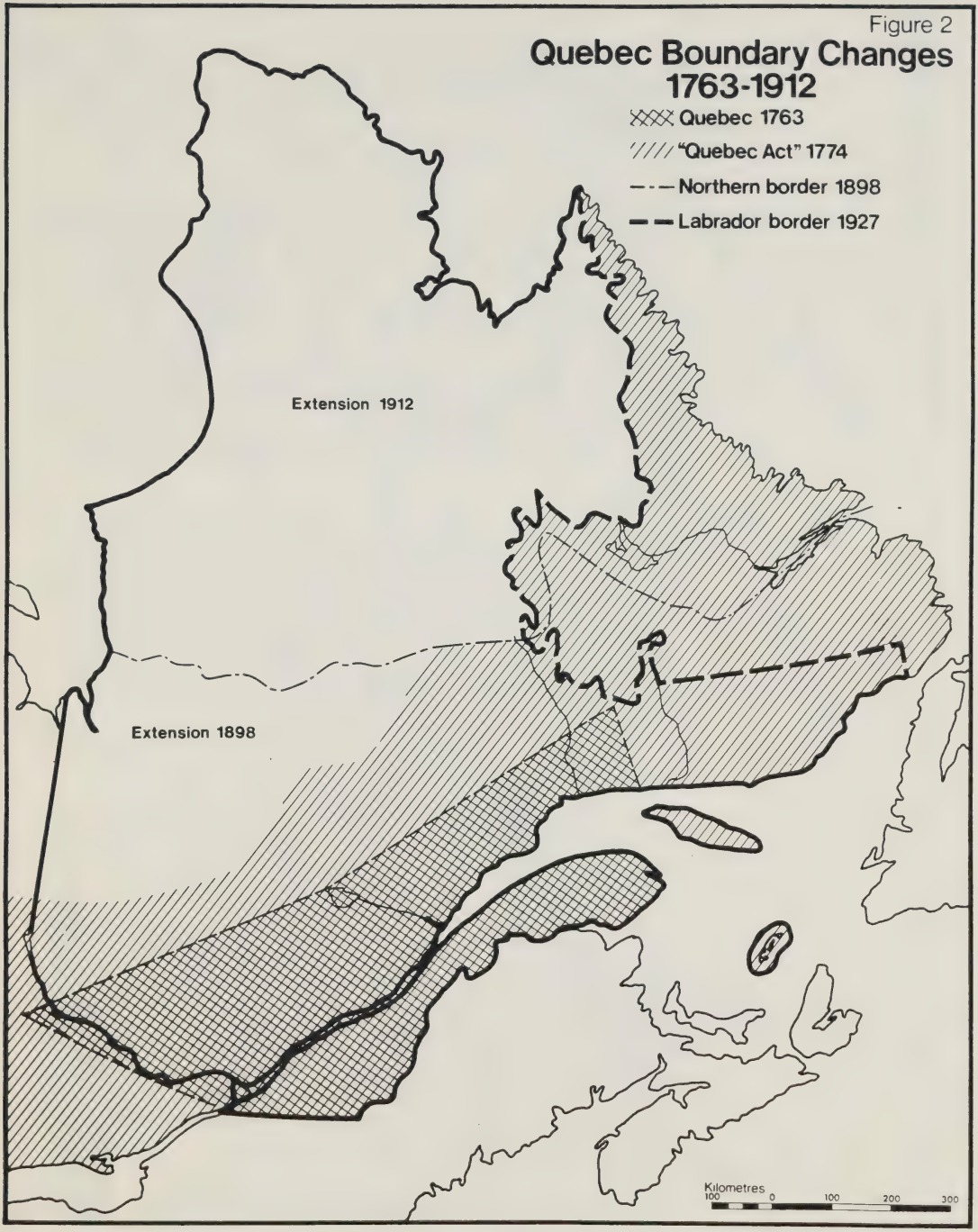


Figure 2
Quebec Boundary Changes
1763-1912
Quebec 1763
"Quebec Act" 1774
Northern border 1898
Labrador border 1927
Extension 1912
Extension 1898
Kilometres
100 0 100 200 300

of the legislative authority. They suggest that this restricts the effect of the doctrine to areas which were actually granted for settlement. Such areas are relatively limited and well documented (see figure 3).

Under these circumstances the British as successors in title, even accepting that French failure to recognize title was sufficient to negate it, were still burdened by the Indian rights of use throughout much of the area of New France. Cumming and Mickenberg[55] suggest that British recognition of Indian title in the area is strongly reinforced by both the Articles of Capitulation, which stated that the Indians were not to be deprived of the lands which they inhabited if they chose to stay there; and by the royal proclamation of 1763.

The royal proclamation in fact raises some controversy, since New France is specifically excluded from the Indian territories. Clearly, however, the sole basis for this appears to be a division between areas which were in part settled or in some way occupied by Europeans and those areas which were totally unsettled. The proclamation states in part, referring to those lands outside Indian territory,

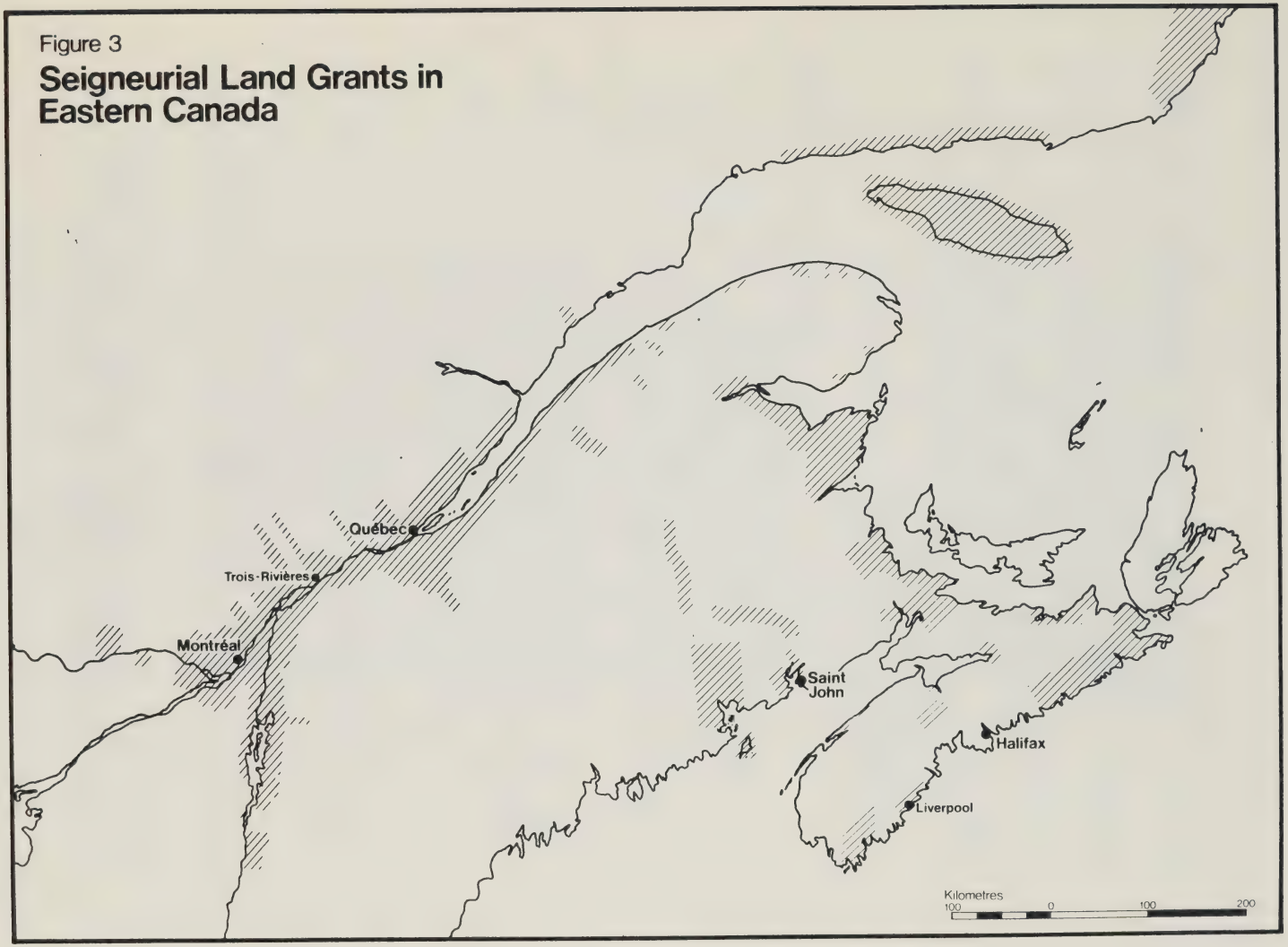
> ....that the several Nations or Tribes of Indians with whom we are connected..... should not be molested in the possession of such parts of Our Dominion as not having been ceded to or purchased by us are restored to them or any of them as their hunting grounds.

It is suggested that the plain meaning of the words is that, as of 1763, Indian title was recognized as existing where title had not been previously extinguished, even in those areas which were not specifically designated as Indian territory. This proposition is supported by the fact that Rupert's Land, which was also exempted from the area specifically designated Indian territory, Indian title was nonetheless recognized in statute.

The New France area remains an engima. Clearly the Indians themselves were the original

Figure 3

Seigneurial Land Grants in Eastern Canada



occupants. They never ceded the area or agreed to any treaty by which the land was purchased. The only claim that Indian title was extinguished relies on the fact that French law does not recognize Indian title, and that title to the land was acquired in this way and passed on to the British authorities. The question of whether this would include all of New France or only those areas which were designated as seigneuries remains unresolved. On either basis it is suggested that there is a good argument for Indian title in the New France area.

3.2.2 Northern Quebec

The situation in the rest of Quebec is somewhat different. In 1774 the Quebec Act extended the borders of Quebec northward to include all lands draining into the Saint Lawrence as far west as Lake Temiskaming and eastwards to include the area draining into the Labrador Sea. The existence of Indian title in this area can hardly be doubted since much of the area had been specifically designated Indian Territory in 1763. Nevertheless no attempt was ever made to extinguish Indian title in the area, which is probably not surprising since the land is largely shield land and unsuitable for settlement. After the enactment of the Quebec Act, Quebec bordered directly on Rupert's Land in the north - a situation which prevailed until the Hudson's Bay lands were purchased by the Dominion in 1870.

In 1898, and again in 1912 the boundaries of Quebec were extended northward. The first extension incorporated lands in the Hudson Bay watershed, the subject of dispute before 1763, but indicated a northern boundary in the Atlantic watershed which followed the Churchill River and its tributary, the Ashuanipi. As a result part of the area within provincial jurisdiction under the Quebec Act of 1774 was lost.

In 1927, the Privy Council in Re Labrador Boundary[55a] held that the Quebec border should be drawn even further south with the result that all the area draining into the

Labrador Sea became part of the Newfoundland colony. The second extension in 1912 added the whole of the eastern part of the Hudson's Bay watershed and the Ungava Bay watershed to Quebec. All the lands transferred to Quebec in the extensions had previously been part of Rupert's Land. Under the terms of the order in council by which the land had been transferred to the Dominion in 1870, the settlement of all Indian claims for compensation for land settled were guaranteed by the Dominion. Later, when the lands were transferred to the Province of Quebec, under the terms of the Boundaries Extension Act,[56] the obligation to settle outstanding land claims was also transferred. thus under Section 2(c) of the act, it was agreed:

> That the Province of Quebec will recognize the rights of the Indian inhabitants in the territory above described to the same extent and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights...

Under the terms of a parallel act,[57] Ontario had by 1929 negotiated treaties with the Indians of the northern and northwestern areas of that province extinguishing rights derived from original occupancy in return for cash payments and guaranteed rights under treaty. Quebec, however, ignored any obligations which the act imposed until the late 1960s when it became evident that the hydroelectric potential of the area might be developed. In 1971 the Dorion Commission was established to assess the obligations of the Government of Quebec to the native people of the northern parts of the province. The commission concluded that there was an obligation to extinguish native title, and duty to pay compensation for any rights surrendered.

3.2.3 Treaties

In November 1975, after two years of negotiation, the province signed the James Bay Agreement which extinguished native title to

410,000 square miles - the land of the boundary extensions of 1898 and 1912. Under the terms of the agreement the Cree and Inuit obtained almost total control of some 5,000 square miles and the exclusive right to take certain game animals throughout the whole treaty area.

The James Bay settlement has been criticized as reminiscent of earlier unenlightened treaties aimed primarily at legal extinguishment of title without considering the primary long-term concerns of the native people. Although these criticisms may well be justified, there is little doubt that the settlement is nonetheless a major landmark representing the first official recognition by a government in French Canada of the legitimacy of native claims.

3.2.4 The Position of National Parks in Quebec

Quebec's two national parks lie within the area delimited as Quebec by the treaty of 1763 but outside the areas which had, under French rule, been designated as seigneuries. The arguments that title does not exist seem weak, based on non recognition under French law, or on the basis that occupation since time immemorial cannot be shown to exist.[57a] The apparent recognition of Indian title in this area by British authorities after 1763 provides good evidence that title does exist and should be recognized. Moreover, the settlement in northern Quebec may increase demands for settlement of claims in areas of Quebec where there has been no settlement of claims.

3.3 Newfoundland and Labrador

3.3.1 The Basis of Claims

No treaties of surrender have ever been negotiated by either federal or provincial authorities in either Newfoundland or Labrador; however, the total destruction of the Beothuk Indians in the 18th and early 19th centuries removed any potential in Newfoundland for claims based on aboriginal occupancy.[57b] In Labrador, unextinguished title clearly subsists both on the basis of aboriginal title based on occupancy and on the recognition that area was Indian territory under the terms of the royal proclamation of 1763.

3.3.2 Position of National Parks in Newfoundland and Labrador

As a result of the destruction of the native Indian population of Newfoundland, there seems to be no basis for claims of any type relating to Newfoundland's two national parks. The situation in Labrador where there are at present no parks must be regarded as essentially similar to that in areas of the Northwest Territories where treaties have not been negotiated. In view of the policy adopted in other northern areas, it appears that the gazetting of any park in Labrador would require negotiation with the indigenous native people with a view to settling existing claims.

3.4 The Maritimes

The area includes Nova Scotia, Cape Breton, New Brunswick and Prince Edward Island, the areas of Canada with the longest history of European settlement.

3.4.1 History of Sovereign Occupation

During the 17th century, the area changed hands on a number of occasions involving successive occupation of parts of the region by French and English. In 1713 New Brunswick and Nova Scotia were finally ceded to Great Britain under the terms of the Treaty of Utrecht; 50 years later Cape Breton and Prince Edward Island were added to the British colony of Nova Scotia, which became a province. In 1769 Prince Edward Island became a separate province. Later in 1784 New Brunswick and Cape Breton also became separate provinces. Finally in 1820 Cape Breton again became part of Nova Scotia.

3.4.2 Nova Scotia and New Brunswick

The Indians of the Maritime provinces were frequently involved in the hostilities between English and French which persisted through the latter part of the 17th and the early part of the 18th century. Most frequently the Indians sided with the French. In 1693, and again in 1713, treaties were made with the Indians in an attempt to protect colonies in the

Massachusetts Bay area. The treaties were however, primarily peace treaties and did not deal exhaustively with property rights.

In 1725 a new treaty was signed[58] by Indian leaders who claimed to represent all Indian people living in New England and Nova Scotia, including those who still lived in areas recognized as French territory. The terms of the treaty are obscure, but appear to recognize the right of the Indian signatories to fishing, hunting and trapping on lands which had not at that time been sold to or occupied by English subjects. The three sections of the treaty apply respectively to the provinces of New Hampshire, Massachusetts and Nova Scotia. Specifically, the section relating to Nova Scotia states only that the Indians agree to live in peace "according to the articles agreed". As the only articles agreed are those relating to Massachusetts, which give fishing, hunting and trapping rights to the Indians, it appears that these rights were extended to the Indians of Nova Scotia. However, a second treaty purporting to be signed on the same date[59] provides no such rights, indicating only that the Indian signatories will not molest settlers in legally established settlements or those in settlements to be established in the future.

As a consequence there remains some uncertainty as to whether one or two treaties were signed in 1725; and, if only one is genuine, as to which is the real one (see for example Hurley, D.M. 1962).[60] A new period of conflict ensued which ended in 1752 when a new peace treaty was concluded, the governor of Nova Scotia and Micmac Indians being signatories.[61] The new treaty guaranteed that the Indians would be allowed to hunt and fish as usual, and that, in addition, the British authorities would provide certain supplies and provisions on an annual basis in return for adherence to the terms of the treaty of 1725.

It is evident, however, that the continued influx of settlers remained a problem; and in 1761 a proclamation issued by the lieutenant

governor of Nova Scotia directed that settlers who were located on lands claimed by the Indians or designated as Indian reserves should remove themselves. Moreover, it was directed that Indian fisheries on the coast should be respected pending some directive to the contrary.[62]

The status of various treaties negotiated between British authorities and Maritimes Indians prior to 1763 remains uncertain, the courts having avoided deciding the broader issue of validity of the treaties themselves by demanding strict proof that Indians claiming under the treaties are successors in title to the original seigneuries.

In R v. Syliboy[63] a Nova Scotia county court concluded that the treaty of 1752[64] did not provide all members of the Micmac tribe of Nova Scotia with hunting and fishing rights overriding those generally applicable to the people of Nova Scotia under statute. The court would not accept the argument that the Micmac tribe formed an indivisible unit. Rather it found, if valid at all, the treaty applied only to a small band of Indians from the Shubenacadie area. This decision, upheld by the Appelate Division of the Court of New Brunswick in R v. Simon,[65] also gains support from the Ontario District Court decision in the case of R v. Wesley.[66] In that case, the court was faced with determining the rights of a defendant whose tribe were scattered throughout different treaty areas. After considering expert evidence provided by anthropologists, the court decided that the most important organizational divisions in the traditional native Indian Society were at the band level, not at the tribal level.

In the case of R v. Simon,[67] the court considered the treaty of 1725,[68] but concluded that no evidence had been put before the court which linked the Indian signatories - Penobscot, Naridgwack, St. John's and Cape Sable Indians - with the defendant, a member of the Micmac tribe of Nova Scotia. The court also held that in order to be included within the residual category of the treaty, as Indians

who at the time of the treaty had inhabited "His Majesties Provinces aforesaid", evidence would have to be addressed to the court which showed that the claimants under the terms of the treaty were indeed successors to Indians who had resided in Nova Scotia, as it was at the time of signing of the treaty in 1725.[69]

In the case of R v. Francis[70] Chief Justice Hughes of the New Brunswick Court of Appeal considered the effect of a treaty of ratification signed by members of the Micmac tribe in 1779 which stated that the Micmac Indians "Renew, Ratify and confirm all former treaties entered into by us." The Chief Justice, however, pointed out that the ratification could not be considered an affirmation of the treaties of 1725 and 1752 unless it was just proved that the treaties themselves were applicable. This he found had not been done.

It is clear therefore that although there has been no outright rejection of claims made under treaties signed during the 18th century, the courts have shown a marked reluctance to allow claims based on the treaties.

In the case of Warman v. Francis,[71] Mr. Justice Anglin of the New Brunswick Queen's Bench examined the question of grants made to settlers in New Brunswick on land which had previously been designated Indian reserve. The learned judge, in finding that the province before Confederation had the power to make such grants, suggested that if there were no surrenders of proprietary rights in the province, this was because there were no recognized rights to surrender. In support of this proposition, he cites a passage from the case of Johnson v. Mackintosh,[72] which recognizes Indian rights of occupancy, albeit qualified by the right of the Crown to extinguish title. This is a quite different proposition since it demands affirmative action from the Crown in order to destroy the inherent Indian right.

Under these circumstances, the judgment in the case that the province had legitimately granted the lands in question to the settlers under the Act of 1844,[73] clearly an affirmative act as required by Johnson v. Mackintosh, is clearly correct. However, the wider implication derived from the judgment is that where there has been no surrender of the aboriginal right of use, this continues to subsist except where specifically removed by legislation. It is suggested that the dictum of Mr. Justice Anglin that the rights in question are not recognized by law is inconsistent and clearly contrary to the conclusions of the Supreme Court of Canada later drawn in the case of Calder v. A.G. B.C.[74]

3.4.3 Lands Specifically Reserved for Indian Use

The question of lands reserved for Indians was specifically considered by the court in Warman v. Frances,[75] and the court in that case concluded that such proprietary rights could be extinguished by competent legislation. The judgment is confusing, treating rights given by treaty and those derived from aboriginal usage as similar; however, the case suggests that rights derived from either source may be extinguished by competent legislation.

3.4.4 Sources of Indian Claims in the Maritimes - Summary

It is suggested that three district sources of claims exist:

a) Treaty: Both the treaty of 1725 and of 1752 suggest that Indians in the Maritime provinces were historically granted usufructory title to unoccupied land in the treaty areas. It is suggested that the validity of claims based on these sources has never been truly tested because of the failure of claimants to provide evidence that they were successors to the original signatories. It is suggested that expert anthropological and sociological evidence on this point is probably available and might be use in future claims under the treaties.

b) Aboriginal Rights: In the Maritimes there was no organized surrender of rights by the Indians and although settlers were encouraged to negotiate surrenders on their own behalf, it is probable that the vast majority of the land was never officially surrendered.[75a] This fact was acknowledged in the judgment in the case of Warman v. Francis.[76] The existence of aboriginal title in Canada after the Calder case seems well established, whether based on the common law as found in Johnson v. Mackintosh[77] or under the terms of the royal proclamation of 1763. Although it has been argued that the Crown title in the Maritimes was derived from the French, and the French did not recognize Indian title, the fact that French authorities at various times insisted that Indian title did exist is problematic.[78]

c) Reserve Lands: In the Maritimes, as in most other areas, land set aside for Indian reserves is administered by the federal government. In such cases, title may be surrendered by the Indian bands for whom the land was set aside and sold on their behalf by the Crown. Under these circumstances any subsisting Indian title is extinguished by the transfer to the third party purchaser. In cases where the land is never sold and transferred, the land is presumably held in trust for the Indians concerned. The case of Warman v. Francis[79] suggests that the Crown may extinguish title by legislation. Since such extinguishment amounts to expropriation, it is probable that in Canada there is a right to compensation.

3.4.5 The Position of National Parks in the Maritimes

There are five national parks within the Maritime provinces. In two of these, the park in Prince Edward Island and that on Cape Breton, claims appear restricted to those based on the royal proclamation of 1763 and to aboriginal title or reserve land surrendered to the Crown but unsold. These areas were in

French hands in 1725 and 1752 when the most controversial Maritime treaties were made. The other three parks, Fundy, Kejimkujik and Kouchibouguac, were all within the boundaries of Nova Scotia in 1725 and 1752 and may be subject to future claims relating to treaty rights.

There is at least one instance in which surrendered but unsold Indian reserve land has been found to exist within a national park, the case involving a portion of the old Richibucto Reserve where lands which were surrendered at the beginning of the century the area later having been gazetted as Kejimkujik Park. It appears probable that Indian title to such areas may be legally extinguished by competent legislation by the federal Crown and payment of compensation.[80]

3.5 Ontario

European settlement in Ontario largely post dates the end of the American Revolutionary War. As a consequence the royal proclamation of 1763 is of paramount significance to Indian title in the area, which was largely designated Indian reserve land by the proclamation.

3.5.1 Ontario Treaties

With the defeat of the British in the United States in the American War of Independence and the influx of United Empire Loyalists into southern Ontario, the demands for land in Ontario forced authorities to seek land surrenders in the area which as recently as 1763 had been proclaimed Indian Territory. To this end early surrenders of land were negotiated with the Mississauga and Chippawa Indians in the area north of Lake Erie and Lake Ontario. The agreements involved surrender of all rights to the land in return for cash payments and payments made in trade goods.[81] Controlled immigration during the 18th century resulted in surrender of land as far north as Orillia and eastwards along the Ottawa Valley from Pembroke almost as far as the present site of Ottawa.

3.5.1.1 Treaties of Surrender before 1850

The negotiation of relatively small surrenders before 1850 was superseded by a policy whereby large tracts of land were surrendered to promote settlement in the west and forstall northward expansion of the United States in the area. The first of the treaties, the Robinson Huron and Robinson Superior[82] treaties, related to lands in the northern watershed of Lakes Huron and Superior and included details which became standard in later treaties:

a) provision for the allocation of reserve lands to the Indians

b) restrictions on alienation of reserve lands

c) negotiation of the treaty in open meeting.

Contemporary account of the early surrenders indicates clearly that the primary Indian concern was to retain hunting and fishing rights in the areas surrendered. As a result, both Robinson treaties reserved these rights to the inhabitants of the surrendered lands, stating that the Indians concerned would retain the right:

> to hunt over the territory now ceded by them, and to fish the waters thereof as they have heretofore been in the habit of doing saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals and occupied by them with the consent of the provincial government.[83]

Thus, although the title to the land was surrendered, rights akin to those claimed by virtue of aboriginal usage (to hunt and fish) were preserved by the treaties.

Two important points are raised by the wording of the treaties in the light of present day usage:

a) Does the right to hunt and fish "as previously" restrict use of the game and fish resources to personal use, or may Indians claiming under the treaty hunt and fish commerically?

b) How broad is the meaning of the restriction on use relating to areas "sold or leased to individuals or companies of individuals and occupied by them with the consent of the provincial government"?

a) The term "as previously" gives at least the right to hunt and fish for subsistence purposes; however, to suggest that this is the total extent of the rights provided may be considered an unrealistically narrow interpretation. Evidence indicates that barter between Indian groups can be demonstrated to extend far into the pre-European era,[84] and early accounts of contact between the fist Europeans with the Canadian Indians suggest that the Indian desire to trade was an important motivating factor.[85] It is suggested therefore that a much wider interpretation than mere subsistence use should be given to the words of the Robinson treaties. This is supported by the judgment in the case of R v. Penasse.[86]

b) The terms of the treaty clearly indicate that the rights to hunt and fish were not to be lost unless the land in question was sold or leased and occupied. Consequently it is suggested that mere ownership of the land does not destroy Indian rights under treaty, and it was clearly not intended by either party at the time of treaty that the Indians should be denied access to the large tracts of land not occupied or cultivated.

Three other treaties apply to areas in Ontario: Treaty No. 3 covers the Kenora, Rainy Lake and Grassy Narrows areas of northwestern Ontario; Treaty No. 9 covers the Ontario portion of the Hudson Bay watershed; and the 1923 Treaty which covers a large block of land extending from the north shore of Lake Ontario as far north as Lake Nipissing and eastwards along the Ottawa valley to Pembroke.

3.5.1.2 Treaty No. 3

Treaty No. 3 states that:

> Her Majesty further agrees with her said Indians, that they shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes.

The wording of the terms Indian use of land under Treaty No. 3 varies from that contained in the Robinson treaties in three important aspects:

a) There is not direct limitation in terms of previous use, but the word avocation may imply ordinary or usual use. On the basis of the argument suggested above however, this would be broad enough to allow hunting and fishing for trade or barter.

b) Under the terms of Treaty No. 3, Indian hunting and fishing rights on surrendered land are subject to regulation by the federal Crown. Clearly, in the case of federal reserves such as national parks or military reserves, it appears to be open to the federal government to restrict or limit hunting and fishing within the terms of the treaty. In the case of provincial Crown land the problem would be more difficult, as the province is apparently not given the right of regulation under the terms of the treaty, and the regulation of provincial lands is ultra vires the federal Crown.

c) Treaty No. 3 also broaden the category of land uses which result in automatic loss of treaty rights to include mining, lumbering and "other uses", in addition to settlement.

In R v. Smith[87] and R v. Rider,[88] it was argued that similar wording in Treaties No. 6 and No. 8 must be interpreted using the ejusdem generis rule; and when this was done, it was argued, parks and game preserves did not fall within the ambit of "other uses". In R v. Smith, the Supreme Court of Saskatchewan held that the categories specifically defined - settlement, mining and lumbering - did not fall within an identifiable genus, and that consequently there was no limitation on the meaning of other uses. In R v. Rider, an Alberta court reached the same conclusion.

3.5.1.3 Treaty No. 9 and Adhesions

Treaty No. 9 includes guarantees to the Indian signatories that they will be allowed to hunt and fish on the lands surrendered. The change in wording from "avocations" to "usual vocations" does not appear significant. More important is the fact that trapping is included expressly in Treaty No. 9. Once again, however, all rights provided under the treaty are subject to the provision that they may be changed by federal regulations. In addition land used for trading provides an additional expressed exception to the right of Indians to hunt, fish and trap on all lands surrendered. Arguably the differences between the terms of Treaty No. 3 and Treaty No. 9 are of little significance in terms of the legal rights provided for Indians on surrendered lands. It is suggested that both probably provide the right to hunt, fish and trap both for personal use and for trade or barter. Such rights, however, are clearly subject to alteration by the federal Crown.

3.5.1.4 The Treaty of 1923 with the Chippawa and Mississauga Indians

The most recent Indian land surrenders occurred in the 1920s when the Government of Ontario negotiated the surrender of Indian title to large tracts of land to the east of Lake Huron. Unlike the number treaties, these negotiations gave no rights to fish and hunt on unoccupied Crown land. Instead the primary compensation consisted solely of a large cash payment ($250,000). In addition, reserve lands were set aside to which members of the Mississauga and Chippawa tribes retained sole rights; however, even on the reserve lands, under the agreement, the Supreme Court of Canada held in the

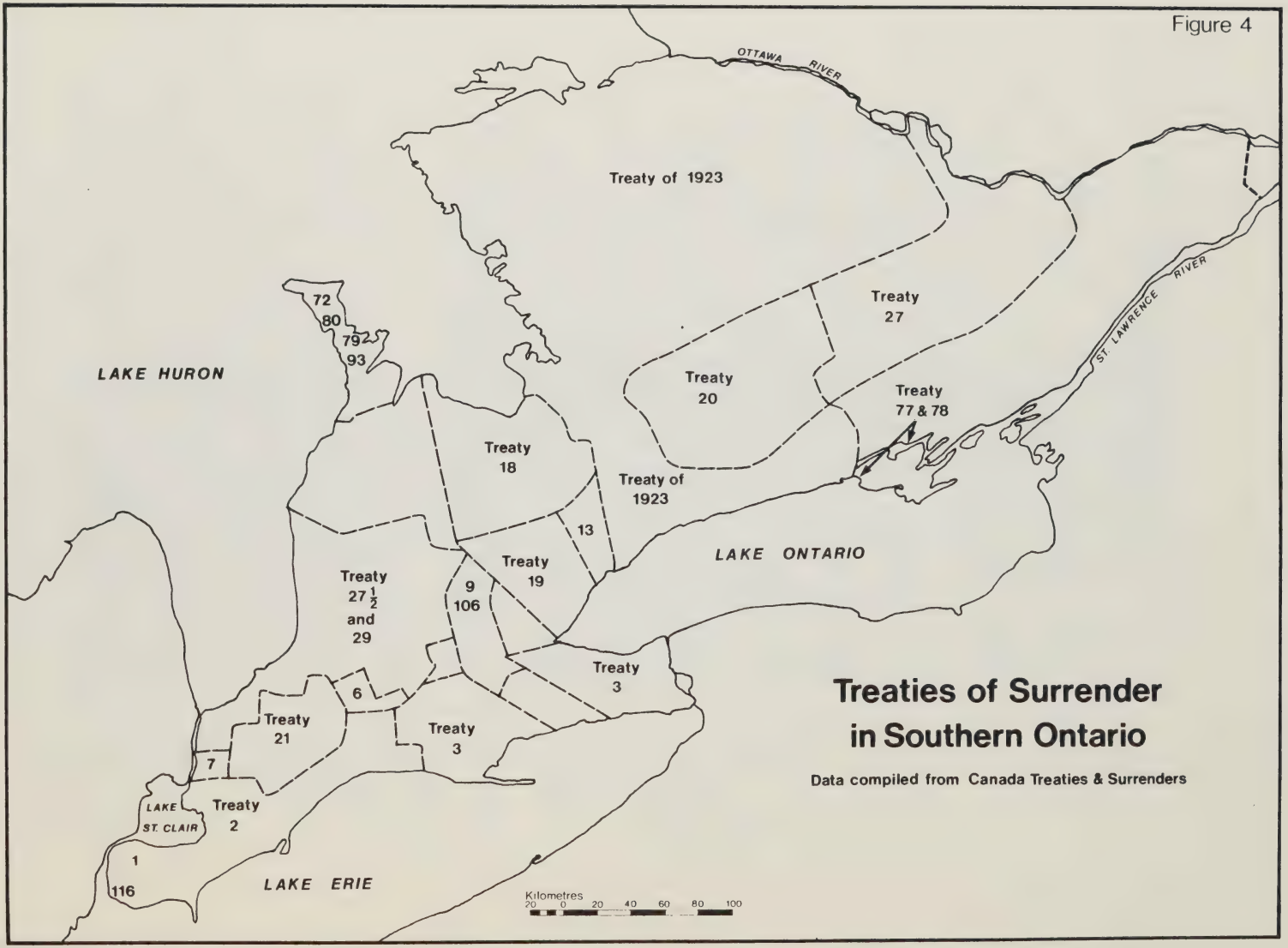
case of R v. George[89] that Indian rights were subject to competent federal legislation.

3.5.2 Areas for which no Treaties were located

On the basis of examination of "Indian Treaties and Surrenders",[90] four areas were identified in Ontario for which no surrenders could be located (see figure 4). The first area, the south of Georgian Bay, includes an area south of the Bruce Peninsula. The second is a block of land in the St. Lawrence and Ottawa valleys adjacent to the Quebec border, possibly including part of the eastern Lake Ontario shoreline.[91] The third area includes several areas adjacent to the Grand River tract. The fourth area consists of the border part of the Grand River valley surrendered under the terms of treaty No. 3, but given to the loyal Six Nation Indians after the Revolutionary War. It is possible that surrenders do exist in some areas; however, archival research is required to provide a definitive answer to this uncertainty. If surrenders do exist, they are probably complete surrenders, similar to other surrenders negotiated in southern Ontario. If not, subject to the argument that the area was colonized under French Law and title was extinguished, Indian title based on the royal proclamation of 1763, or on the general law relating to colonizing nations may provide a basis for future claims in these areas.

3.5.3 Summary

A variety of treaties were negotiated in southern Ontario, which generally involved the complete surrender of rights. In northern Ontario, the number treaties reserved hunting and fishing rights to the Indians, but they also included terms whereby the federal Crown could impose regulation under the terms of the agreements. In addition to the rights given the Crown to impose regulations, further powers exist under the terms of 91(24) of the British North America Act, which gave the Federal Legislature powers over Indians and Indian Lands. Either basis may be used to extinguish



Treaties of Surrender in Southern Ontario

Data compiled from Canada Treaties & Surrenders

Indian rights given by treaty on the basis of the decision in R v. George.[91a] In a few areas of the province, Indian title may never have been extinguished. In these areas claims on the basis of aboriginal rights or on the basis of the royal proclamation appear viable.

3.5.4 The Position of National Parks in Ontario

Two of Canada's national parks lie within the area of pre-1850 surrenders. Point Pelee lies within the area surrendered in 1790 by representatives of the Ottawa, Pottowatony, Chippawa and Huron Indians and British authorities. The St. Lawrence Islands Park area probably lies within the area surrendered by the Mississauga Indians of Alnwick in 1856, a non-specific surrender which refers only to islands and lands claimed by the band in the Bay of Quinte, Wellers Bay, the St. Lawrence River or adjacent areas. Neither surrender purports to retain any rights for the Indian signatories.

Pukaskwa National Park lies within the Robinson Huron Treaty area. As pointed out above, this treaty, like later treaties, provides rights to hunt and fish in the surrendered area but reserves no right of regulation to the federal government. Significantly, under agreements with the Indians of the area, hunting and fishing rights have been granted within the park area and trapping has been allowed to continue. Pukaskwa is thus the only park within the national parks system where treaty rights involving hunting and fishing have been acknowledged in this way. It is emphasized, however, that the terms of the Robinson treaties are significantly different from the number treaties which also provide various Indian rights on surrendered lands.

Georgian Bay Islands National Park lies close to the southward shoreline boundary of both the Robinson Huron and the 1923 Chippawa and Mississauga Indians. In fact the park area appears to be covered by both surrenders; so even if hunting, fishing and trapping rights were guaranteed by the Robinson Huron Treaty, these were surrendered in the park area under the terms of the 1923 treaties.

3.6 The Prairie Provinces

Indian rights of use on surrendered lands in the prairie provinces are entirely dictated by the terms of the number treaties signed after the transfer of Rupert's Land to the Dominion in 1870.

3.6.1 History of Development of Government before 1870

Before 1870, the interior of Canada was wholly controlled by the Hudson's Bay Company under their charter of 1670. Although the charter provided the company with wide-ranging powers which would have allowed the establishment of settlements and negotiation of land surrenders, the company undertook no such steps. Throughout the period, the primary interest of the company was the development of the fur trade and maintenance of friendly relations with their suppliers, the Indian people of western Canada. As a consequence the company made no demands for land and clearly posed no threat.

The first attempts to settle the area west of the Great Lakes occurred in 1812 with the establishment of settlement at the fork of the Red River. Under the terms of an agreement with the Salteaux and Cree, the settlers agreed to make annual payments to the Indians for quiet enjoyment of the lands settled, clear recognition of Indian title to the lands. It is evident that the Hudson's Bay Company also recognized that title to the lands was vested in some form in the Indian inhabitants of Rupert's Land. Thus, in the agreement by which the company transferred control of Rupert's Land to the Dominion, a proviso was included that the Dominion would be responsible for payments to the Indians for securing title to the land.

3.6.2 Treaties

Treaties No. 1 and No. 2

The treaties signed in 1871 cover southern Manitoba and part of southeast Saskatchewan. A contemporary account of negotiation of the treaty[91b] makes it apparent that the Indian

negotiators were concerned that they might lose the right to hunt and fish. They were given assurances that they would not, but no such guarantee appeared in the surrender documents.

Cumming and Mickenberg[92] point out that Indian tradition was entirely oral and that the Indian signatories clearly looked upon the assurances as binding. In retrospect it is evident that at the time of signing the treaties the Indians:

a) did not understand the terms;

b) were misled, perhaps unintentionally, as to the contents of the agreements; or

c) believed that they had retained rights to hunt and fish as they had done formerly.

Subsequently, some terms apparently agreed at the time of signing were included in a new written agreement.[93] The amendments did not, however, include provisions whereby hunting and fishing rights were reserved to the Indians. Nonetheless, it is suggested that in view of evidence suggesting Indian signatories did not understand what they were signing,[94] the courts would probably accept the documented oral promises as part of the treaty.[95]

3.6.3 Treaties No. 4 to No. 10

Each of the treaties contains relatively standard provisions relating to the rights of Indian signatories to use the land after surrender which reads generally:

> ...the said Indians shall have the right to pursue their avocations of hunting trapping and fishing.... Subject to such regulations as may from time to time be made by the Government of the Country.....saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering trading and other purposes.

In all cases, the rights given are subject to subsequent government regulation. In addition, there are minor variations in the terms relating to rights given. For example Treaties No. 4, 8, 10 and 11 indicate that rights to fish, hunt and trap are retained on surrendered lands. Treaties No. 5 and 6 provide only for hunting and fishing whilst Treaty No. 7 allows only the right to hunt on unoccupied lands.

3.6.4 The Natural Resources Transfer Agreements

Under the terms of the agreements,[96] the federal government transferred administration of Crown lands in various provinces to the provincial legislatures with the exception of those which fell into the category of special federal reserves, including national parks, Indian reserves, and military reserves. In making the agreements which were incorporated into the constitution, the federal government reserved certain rights relating to Indian use of Crown lands; consequently, since 1930, interpretation of Indian rights in the prairie provinces has been based on the courts' resolution of conflicts between the terms of the original treaties, the terms of the Natural Resources Transfer Agreements and the effect of other federal and provincial legislation.

The effect of the agreements is apparently to limit the rights to hunt and fish solely to subsistence use, whereas several of the treaties suggest that the rights given are broader (i.e. the inclusion of trapping in some clearly indicates commercial usage was intended). It appears, however, that the courts will find that federal legislation may override rights given under treaty.[97] A number of cases beginning with R v. George and R v. Sikyea have held that federal legislation of general application overrides Indian treaty promises. In Daniels v. The Queen,[98] The Supreme Court of Canada held that subsection 12(1) of the Migratory Birds Convention Act[99] overrode both the rights given by treaty and the guaranteed right to hunt for food given by the Natural Resources Transfer Agreement.[100] In this case, the court found that the purpose of the transfer

agreements was to limit the power of the provincial legislatures to restrict Indian rights on Crown land, not to limit its own power to act. Notably, however, four judges of the Supreme Court held that the Natural Resources Act as part of the Canadian constitution was paramount legislation and that in enacting it the federal government had limited its own power to modify the rights given to the Indians. The decision in the Daniels case was recently reaffirmed by the Supreme Court of Manitoba in the case of R v. Catagas[101] in which the Chief Justice of Manitoba stressed that the Migratory Birds Convention Act[102] does limit the rights given to Indians under the Natural Resources Transfer Agreements, and it may not be circumvented by the Crown adopting a policy of non-prosecution.

The federal right to override both the terms of the treaties and the Natural Resources Transfer Agreements thus seems well established. In addition, however, it appears that provincial regulations may also restrict Indian rights given under the transfer agreements. In the case of R v. Smith,[103] the Supreme Court of Saskatchewan interpreted the words "unoccupied Crown lands" not to include an area which had been designated by the provincial government as a game sanctuary. In a more recent case,[104] however, Mr. Justice Morrow refused to convict an Indian under an Northwest Territories Ordinance, holding that a territorial game reserve was not occupied land. In so holding he cited Mr. Justice Niven who stated in the case of R v. Strongquill,[105] that unoccupied land is a question of fact, not law, thus holding that the mere designation of an area as having some particular use is ineffective in determing whether or not it would be considered occupied or not.

It appears, however, that where matters of safety are concerned, the provinces may have the power to modify the terms of Indian hunting and fishing rights given by the transfer agreements. In the case of the Queen v. Myran[106] et. al., the Supreme Court of Canada found that provincial legislation

effectively modified hunting rights on Crown lands where matters of safety were involved.

It is suggested that Indian rights to hunt and fish on Crown land in the prairie provinces are subject to regulation by the federal government where the matters involved are within federal jurisdiction (i.e. where the land concerned is federal reserve, or the matter concerned is for example the subject of international treaty). In addition, it appears that Indian rights on Crown land may also be restricted under some circumstances by provincial enactments. In this scheme, the federal power of regulation appears unaffected by the transfer agreements.

3.6.5 The Position of National Parks in the Prairie Provinces

Of all the regions of Canada examined, Indian rights in the prairie provinces appear to be most clearly defined and uniform. Over the whole area, rights are determined by the treaties, these having extinguished rights arising from other sources. It is suggested that as national parks are federal reserves, the number treaties reserved in each case the right to regulate Indian use of the surrendered land irrespective of whether the land was or was not occupied within the meaning of the terms of the treaty.[107] In this event, the enactment of legislation restricting Indian activities within national parks does not contravene the terms of the treaties. In addition, it has been held, the National Resources Transfer Acts by which Indian Rights to hunt and fish for food were apparently incorporated into the constitution do not curb the effect of validly enacted federal legislation.[108]

3.7 British Columbia

Whilst Indian rights of use of Crown land in the prairies are entirely dictated by the terms of surrenders, this pattern is almost entirely reversed in British Columbia. There, historically, provincial authorities have refused to recognize the validity of any land claims at all.

3.7.1 Development of the B.C. Government Attitude to Indian Claims

The historical development of the attitude of the Government of British Columbia to Indian land claims has been thoroughly explored by Cumming and Mickenberg.[109] They suggest that although the Hudson's Bay Company accepted that Indian title existed before 1858, financial circumstances of the colonies prevented the negotiation of settlements in the early years after transfer of the title to the Crown. Later, this hardened into a deliberate policy of non-recognition of claims.

In 1858, James Douglas, previously chief factor of the Hudson's Bay Company in the area, was appointed first governor of the new colony of British Columbia. Initially, he was anxious to acquire land surrenders which he considered could be achieved relatively cheaply at that time. When, in 1861, he attempted to obtain £3,000 for this purpose from the British Crown, his demand was rejected on the basis that this was not a matter which should burden the British taxpayer. Subsequently, the management of Crown lands in British Columbia in 1864, after the retirement of Douglas, came under the authority of Sir Joseph Trutch. Thus, not only was no settlement negotiated, but when reservations were allotted, Trutch took advantage of imprecise instructions to limit individual allotments to 10 acres per family.

After 1871, the federal government and the British Columbia government became embroiled in a prolonged dispute relating to suitable reservation allowances the federal government insisting that 80 acres per family was a suitable average for allotment, the British Columbia government insisting that 10 acres was sufficient. An enquiry established to investigate the problem in 1873 continued to operate until 1910 without providing a solution which satisfied the parties, since the province continued to refuse to make any concession. In 1913 a five-man royal commission was established to make recommendations concerning adjustments. Its final recommendations included provisions whereby 47,000 acres were

to be taken from existing holdings and replaced by 80,000 acres elsewhere. In fact, the recommendations solved none of the existing problems concerning hunting and fishing rights, and merely took away from the Indians 34,000 acres of generally good land and replaced it with 80,000 acres of generally poor land.

In 1927 the House of Commons established a special committee in response to the petition of the Indians of British Columbia. Ultimately the committee concluded that the Indians had failed to establish any aboriginal title, but recommended that $100,000 be expended each year in providing technical training, medical care and agricultural improvement, the expenditure undertaken in lieu of treaty payments such as those paid to the Indians of the prairies.

3.7.2 Recent Developments in Recognition of Indian Title in British Columbia

The case of R v. White and Bob[110] involved two Indians charged under the provincial Game Act[111] with hunting in the closed season. The defendants argued that, under the terms of an agreement signed in 1854 by the Hudson's Bay Company, there had been recognition of aboriginal rights to hunt in the area in question. The majority in a 3-2 decision of the Supreme Court of British Columbia agreed that the agreement did give rights in the area in question. On its own, the margin of decision was very narrow. Mr. Justice Norris went on to point out, however, that aboriginal rights had long been recognized by European colonizers, indicating that in the acknowledged scheme the colonizing nation took a dominant estate, but a personal usufructory estate remained with the aboriginal inhabitants. The majority decision was subsequently upheld by the Supreme Court of Canada.

By far the most important decision in Canada on the question of aboriginal rights is the Supreme Court of Canada decision in the case of Calder et. al. v. A.G. B.C.[112] The case involved a claim by the Nishga Indians to Indian rights over approximately 1,000 square miles of the Naas valley in northern British

Columbia based on the royal proclamation of 1763. The court rejected the claim 4-3; however, several important conclusions were reached. Ultimately only 3 of the 7 judges of the Supreme Court agreed that the royal proclamation did not apply to Indians in northern British Columbia. The other member of the majority, Mr. Justice Pigeon, decided the matter on a purely procedural point, holding that no fiat had been obtained to commence the action and it was therefore unvalid. Those members of the majority who found that the royal proclamation did not apply, did so on the basis that the area was in 1763 terra incognita, a finding which has been questioned by at least one authority subsequently.[113]

Although the claim of the Nishga Indians in the Calder case was ultimately rejected, it is important to note that the decision hinged on the fact that the rights claimed were claimed on the basis of the applicability of the royal proclamation. Notably all six judges who considered the question of aboriginal rights found that the royal proclamation was not the sole source of rights, and that Indian rights were recognized by the general law applicable to colonizing nations. It is evident, however, that the Calder case has by no means resolved the problem. In the case of The Queen v. Dennis and Dennis[114] a British Columbia provincial court considered the effect of the British Columbia Wildlife Act[115] in a case in which two Indians were accused of killing a moose out of season. The court held that it was not bound by the Calder case to find that the royal proclamation did not apply, on the basis that the court had been divided on that point. After finding that Indian rights did exist, the court held that these could only be extinguished by federal legislation, or by adoption of provincial legislation by the federal authority under Section 88 of the Indian Act.[116] The court went on to hold that the provincial statute was not of general application, since its effects were more serious for Indian people who depended on hunting in order to feed themselves. Moreover the act had the effect of providing different hunting laws for Indians in different parts of

Canada, contrary to the intent of the Indian Act.

In a subsequent case, R v. Derrikson,[117] the British Columbia Court of Appeal came to a different conclusion in upholding the conviction of an Indian under the British Columbia Fisheries Regulations. The court held firstly that it need not consider the effect of the royal proclamation of 1763, since in the case of R v. George[118] and in the subsquent case of R v. Francis[119] it had been held that federal legislation of general application overrides Indian hunting and fishing rights. Moreover the court also held that there was no need to consider the effect of Section 88 of the Indian Act where the legislation was federal.

3.7.3 The Position of Parks in British Columbia

With the exception of a few small areas on southern Vancouver Island,[120] there have been no land surrenders in British Columbia. The case of Calder et. al v. A.G. B.C.[121] suggests that Indian title is recognized in Canadian law either on the basis of the royal proclamation of 1763, or alternatively on the basis of the general law relating to colonizing nations. In spite of this, however, the Derrikson case suggests that competent federal legislation of general application can extinguish Indian rights irrespective of land surrenders. It must be concluded therefore that the National Parks Act and regulations under the act have this effect.

3.8 Yukon Territory

Although many published maps indicate that a portion of the southeastern part of the Yukon Territory lies within the area covered by surrenders under the terms of Treaty No. 11, evidence recently accepted by the Alaska Pipeline Inquiry[122] suggests that none of the signatories of Treaty No. 11 had hereditary rights in the Yukon. Elsewhere in the Yukon, there have been no other land surrenders and any Indian title recognized in law remains unextinguished.

3.8.1 The Basis of Indian Claims in the Yukon

Although in the Calder case three members of the majority held that northern British Columbia was terra incognita in 1763, in Re Paulette,[123] Mr. Justice Morrow of the Northwest Territories Supreme Court ruled that a portion of the Northwest Territories was within the area covered the royal proclamation. This overruled the decision in R v. Sikyea[124] on this point, on the basis that information not available to the court in the Sikyea case was available and indicated that the area was not at the time of the proclamation "terra incognita". This contention also appears to be supported by the wording of an early imperial statute,[125] enacted to govern the fur trade in the Northwest Territories and Yukon Territory, which refers to the areas as "lying within Indian Territory". This indicates that the area was considered to lie "beyond the Heads of Sources of the rivers which fall into the Atlantic Ocean from the West and Northwest," and thus within the Indian territory defined in the proclamation of 1763.

Subsequently in 1867 when the Canadian Parliament petitioned for the transfer of Rupert's Land and the Northwest Territories to the Dominion, it pledged:

> The claims of the Indian tribes to compensation for land required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.[126]

The promise was incorporated in statutory form as a term of their transfer in the Dominion Lands Act,[127] which stated that no settlement for agricultural purposes, sale of land or lease of timber rights could be made until compensation had been given to the Indians with hereditary rights to the land.

Although the Dominion Lands Act was amended[128] in 1900 adding terms which

allowed the transfer of lands to settlers who established prescriptive ownership, it was nonetheless a precondition of such transfer that Indian title be extinguished by a settlement of Indian claims to title. In the case of Re Paulette[129] Mr. Justice Morrow examined the origin and amendment of the Dominion Lands Act, concluding that the original promise represented a constitutional obligation which was merely formalized by including it in the Dominion Lands Act. Under these circumstances he held that deletion of the sections guaranteeing Indian rights by amendments to the act in 1908[130] and 1950[131] were ineffective in destroying the obligation itself.

It is suggested that the logic of Mr. Justice Morrow on this point is compelling and that the constitutional promise made under the agreement to transfer Rupert's Land and the Northwest Territories cannot be unilaterally deleted by subsequent legislation unless this is legislation clearly framed as a constitutional amendment. In the case of the Canadian constitution this would, in addition, require passage through the British Parliament at Westminster.

3.8.2 Indian Reservations in the Yukon

In the early part of the 20th century, concern that Yukon Indians were losing their traditional lands as a result of the influx of Europeans which accompanied the gold rush resulted in the designation of several reserve areas in the Yukon. The reserve did not, however, attract Indian settlement and were ultimately forgotten when the European population declined again with the exhaustion of the gold fields. The 1972 Schedule of Indian Reserves and Settlements[132] states that there are no reservations in the Yukon. Lysyk,[133] however, suggests that the Department of Indian Affairs still recognizes six reservations in the Yukon.

3.8.3 Recent Developments in Yukon Indian Claims

The foregoing conclusions clearly suggest an obligation to settle Indian claims in the Yukon. This fact was apparently recognized by territorial and federal governments in 1973 when they agreed to participate in negotiations to provide a comprehensive settlement of claims in the territory. The Yukon Native Brotherhood and the Yukon Association of Non-Status Indians joined forces to represent the Indians of the territory. The federal negotiating team included the commissioner of the Yukon. Initial demands from the Yukon Native Brotherhood included the right to hunt, trap and fish on all unoccupied land, and exclusive rights on any lands given to the native people under the terms of a settlement, including the unlimited right to regulate any activities on the settlement lands. The Yukon government in a policy paper issued in 1974 supported the Indian demand for exclusive hunting, trapping and fishing rights on unoccupied land. Subsequently, the federal government's negotiating position appeared to favour a much more limited concession, apparently providing rights to hunt and fish on unoccupied Crown lands for food only.

Negotiations took place in Canada from 1973 to 1976 without reaching any agreement. In January 1977, however, a drastic change in policy saw the establishment of a planning council to undertake open cooperative planning which apparently resulted in some progress towards negotiated settlement. At the present time, however, negotiations are continuing.

In addition to negotiation with the Yukon Indians, negotiations were also undertaken with the Inuit of the western Arctic represented by the Committee for Original People's Entitlement (COPE), the subject of the negotiation being the portion of the traditional hunting grounds lying along the Yukon arctic coast. These negotiations recently resulted in agreement in principle on the terms of a comprehensive settlement of Inuivaluit claims to this area. Under the terms of the agreement, each of the Inuvialuit communities will receive land in fee

simple including all subsurface rights in areas adjacent to existing settlements but subject to existing alienations. A further 800 square miles on Cape Bathurst will be given in fee simple, the federal government undertaking to terminate all existing alienation.

In addition to the limited areas given in fee simple, the agreement also provides that the Inuvialuit would receive surface title to a further 32,000 square miles. In this area the agreement demands that the Inuit will allow surface access to subsurface owners. A final provision provides that the Inuvialuit have title to the beds of all water bodies subject to limited rights of access for other users.

3.8.4 The Position of National Parks in the Yukon Territory

In 1974 after negotiations had commenced with the Yukon Indians an amendment was made to the National Parks Act, by which three areas in the Canadian north were set aside as park reserves, one of these (Kluane) lying in the Yukon. Under the terms of the amendment the areas designated are set aside pending settlement of any rights or interests of people of native origin. In the interim before agreement on a settlement, the act indicates that it applies to the areas involved except in respect of the exercise of "traditional hunting, fishing and trapping activities" exercised by native people of the Yukon and Northwest Territories. The amendment, however, is somewhat unclear in its use of the word "traditional", which is undefined:

a) "Traditional" probably means that any permitted activity is restricted to the group of people who can establish ancestral use of the area in question for that activity.

b) "Traditional" may limit methods of hunting, fishing and trapping to those not involving the use of certain kinds of technology. For example, an extreme interpretation could prohibit the use of firearms, motorized vehicles and mechanical traps.

> Unfortunately, the word does not appear to have been the subject of judicial interpretation, and no definite conclusions can be stated on this point.

In the case of Kluane an additional problem arises from the fact that the land comprising the reserve had, before designation as a park reserve, been a wildlife reserve for 30 years. The questions posed in these circumstances are (1) whether a tradititonal right can survive such a break, and perhaps, (2) whether the status of individuals who actually hunted, fished and trapped in the area before establishment of the wildlife reserve, is any different to those who did not pursue these activities but are descended from individuals who did. These questions and others must await judicial interpretation of section 11 of the National Parks Act.

Ultimately, under the terms of a final settlement of claims, the Yukon Indians may reserve the right to hunt, trap and fish putting the park in a similar position to Pukaskwa and Wood Buffalo. In both these parks authorities currently recognize the right of native people to hunt, fish and trap within park boundaries.

A second national park has recently been proposed for the Yukon under the terms of the joint position paper issued relating to the Inuvialuit settlement.[134] Under the terms of the agreement, an area of not less than 5,000 square miles of the Yukon north slope, would be set aside as a national wilderness park for the purpose of wildlife protection pursuant to suggestions made by Mr. Justice Berger.[135] Native people who can demonstrate traditional use of the area would be allowed to maintain those rights within the park, and would be permitted to maintain small settlements in traditional seacoast locations.

Other important terms in the agreement would guarantee to the Inuvialuit certain economic opportunities relating to park operation, and provide for both Inuvialuit and Yukon Indian representation on a steering committee to advise on management and development of the park.

It is suggested that the agreement represents a pointer to the terms of future park establishment in the north. It is evident that the plan proposed fulfils the needs of the native peoples themselves, reserving to them particular rights on which their traditional lifestyle is based. It also complies with the aims of the national parks system in preserving certain important natural regions and unique ecosystems in the ecologically sensitive north. The fact that the federal government has undertaken to negotiate the settlement of Indian claims, is an indication that such claims are acknowledged to exist. The establishment of new national parks as federal government reserves is clearly subject to the negotiation of the existing claims as acknowledged by amendments to the National Parks Act.[136] It is clear that management policies adopted in national parks in the north will be strongly influenced by the terms of settlements made with the native peoples, who are likely to demand increasingly that they share in any opportunities provided by park establishment, including the opportunity to manage the resources.

3.9 Northwest Territories

Historically the Northwest Territories were divided into two parts: Rupert's Land, administered under the Hudson's Bay charter, and the original Northwest Territories, which lay to the west of Rupert's Land. Although Treaty No. 8 and No. 11 cover a portion of the Northwest Territories, these treaties are not considered by the native people to have extinguished title to the land.

3.9.1 Historical Development of Northwest Territories

The extent of Rupert's Land and the Northwest Territories before 1870 is extremely difficult to determine. What is more certain, however, is that the Hudson's Bay Company made no attempt to extinguish Indian title in the area. Company policy aimed strictly at trading without developing settlements, since the company had no requirement for the title to land which it acknowledged belonged to the natives.[137] The basis of Indian claims in

the Northwest Territories may, however, be different in different areas. Although Mr. Justice Morrow in the case of Re Paulette was prepared to hold that some areas of the Northwest Territories were not terra incognita in 1763, it is quite clear that many areas were not explored until much later.

Fortunately, there is no need argue, as in other areas of Canada, that Indian rights are based on the royal proclamation or on common law rights. Indian rights in the area have been acknowledged under the terms of the transfer agreement of 1870[138] and construed in Re Paulette[139] to represent a constitutional guarantee of Indian settlement obligations.

3.9.2 Extinguishment of Indian Title in the Northwest Territories by Legislation

Cumming and Mickenberg[140] undertook an extensive review of legislation relating to the Northwest Territories which might under certain circumstances be construed to extinguish Indian rights. They suggested that although certain statutes provided the territorial commissioner with a variety of powers which could be construed to give jurisdiction to extinguish Indian title, to construe them in this way would extend the powers of the territorial government beyond that of the provinces under S91(24) of the B.N.A. Act. This, they concluded, could not have been intended.

If the suggestion of Mr. Justice Morrow that the agreement of 1870 represents a constitutional guarantee is accepted, arguably the federal government cannot modify the rights given without constitutional amendment. If the agreement of 1870 is not considered a constitutional guarantee, however, which is likely, it may be open to the federal government directly, or through the agency of the territorial government, to extinguish native rights. In R v. Sigeareak[141] the Supreme Court of Canada held that the Northwest Territories ordinances did apply to an Eskimo who lived in an area which had formerly been Rupert's Land; and thus they suggested this

region was specifically excluded from Indian territory in the royal proclamation.

If the conclusions of Mr. Justice Morrow in Re Paulette are not in fact the law, on the basis of the decision in R v. Sigeareak it is evident that the federal government has under the terms of the National Park Act Section 6(3) provided the power to extinguish Indian title unilaterally, by expropriation or otherwise.

It is suggested that whilst the question of whether the federal government may or may not extinguish Indian title in the Northwest Territories by unilateral action is not absolutely clear, the federal government has by entering into negotiation with various groups of native people in these territories, acknowledged the existence of native title and the duty to extinguish such title on the basis of acceptable terms. Under these circumstances it becomes irrelevant whether the claim to rights is based in the common law, the royal proclamation of 1763, or the agreements under which the Northwest Territories were transferred to the Dominion.

3.9.3 The Position of National Parks in the Northwest Territories

The situation in the Northwest Territories is much the same as that in the Yukon, involving vast areas of land in which there has never been any surrender of Indian title. Moreover, even in those areas where there was surrender under the terms of Treaty No. 8 and No. 11 the federal government appears willing to undertake a new comprehensive settlement to supersede existing rights. Like Kluane, the Nahanni and the Baffin Island parks involves the park reserve format under the amendment to the National Parks Act rather than establishment of the national parks. In this scheme native people who formerly had the right to hunt, fish and trap in the areas designated retain those rights pending settlement of land claims. It seems quite possible, in addition, that any final settlement of claims may reserve certain rights, opportunities and privileges in respect of park areas to the native people as is the case of the COPE agreement.

3.10 Conclusions

The legal basis of Indian claims in different part of Canada is derived from a number of sources including the common law relating to colonization, the royal proclamation of 1763, and treaty. The rights acknowledged to arise from these sources involve use of the natural produce of the land rather than title to the land itself, and thus apply only in unsettled areas - although there may be a right to receive compensation for the loss of use in areas which have been settled. In general, in those provinces where there have been no settlements or incomplete settlement of claims, there appears to be little possibility that provincal authorities will negotiate settlement in the near future and cases of native people hunting and fishing in contravention of provincial statutes will probably continue to come before the courts. In such cases the existence of rights based on aboriginal occupancy, treaty or some other source will continue to be raised as a defense. The result of such cases depends primarily on the view taken by the court of S.88 of the Indian Act and the provincial legislation under which changes are brought.

It is suggested that any challenge to the effect of the National Parks Act or regulations made pursuant to the act could be met on the basis that under S.91(24) the federal government has the constitutional right to legislate in respect of Indian lands, which would include any lands to which Indian people had any kind of title. Where the effect of the National Parks Act is to extinguish Indian rights, it clearly lies within the constitutional power of the federal authority under S.91(24) as legislation in respect of Indian lands. Where this happens, however, there may be at least a moral obligation to compensate for the destruction of rights in this way, which amounts to expropriation.

Besides suggesting that extinguishment of title would be upheld on the basis of the federal power over Indian lands, it has also been held that federal laws of general application (such as the Migratory Birds Act) take precedence over Indian treaty rights.[142] Under those circumstances there is little doubt that the court would find that federal legislation can also extinguish rights based on either the royal proclamation or the general common law, simply because the federal power to legislate takes precedence over

such rights on the basis of the doctrine of supremacy of Parliament.

4. The Evolution of Parks Management Policy - A Response to Demand

4.1 Introduction

Since the establishment of the first national park in 1885, the philosophy of the parks system has undergone fundamental changes. Most recently, the challenge has been to find and adopt policies compatible with the aspirations of native people of Canada's north, whilst pursuing the fundamental objectves of the National Parks Act involving conservation and preservation of the natural environment of areas designed as national parks.

4.2 Historical Development of Parks Philosophy

The early development of national parks, starting with the Banff park in 1885, was primarily centred on development of the tourist industry or on local recreational needs. In this scheme townsites were developed on parks land and sports hunting was actively encouraged (although subsistence hunting by Indians was discouraged).

By the time national parks became established as a distinct administrative entity in 1930, a new philosophy was beginning to emerge. In that year the National Parks Act was enacted laying down guidelines which still dictate the approach to management of park resources. In terms of the philosophy, the most important section in Section 4, which states;

> The parks are hereby dedicated to the people of Canada for their benefit, education and enjoyment subject to the provisions of this Act and the Regulations, and such parks shall be maintained and made use of so as to leave them unimpaired for future generations.

Subsequent management plans have interpreted Section 4 to mean that park areas should be allowed to develop natural climax environments as free from artifical manipulation as possible, to the extent that this is feasible in view of the objective of providing benefit enjoyment and education. To this end existing mineral exploration and timber leases in areas designated as parks were bought out. Cottage developments predating park establishment have been restricted and where

possible reduced, and vehicular access within parks has been reduced or eliminated.

The only resource extractive activity allowed throughout the system is sports fishing, which in many parks is actively encouraged by management of fish resources, including restocking and aerating lakes which would not otherwise carry large fish populations. In addition to sports fishing, duck hunting continues to be allowed at Point Pelee as a result of the order in council which established the park in 1918. Because of the long history of duck hunting in the park, it is looked on as a right rather than a privilege and in spite of the desire to end the activity, it continues.

4.3 Indian Rights and Parks Management in the North

Northern parks differ from those in the south in a number of respects such that the maintenance of traditional Indian activities may not only be justifiable but may actually be desirable:

a) Northern parks are generally extremely large and relatively remote.

b) Local people depend on park area resources for food, shelter and income before establishment of the park.

c) There is no local alternative source of employment for the native people that will fulfil their needs and allow them to follow their traditional lifestyle.

This special combination of factors was first recognized in Wood Buffalo Park some 50 years ago as justifying the implementation of special management policies.

4.3.1 Wood Buffalo Park

In 1922, when the park was established, no special provision was made for trappers who had previously depended on traplines located in the area. In 1926, however, the park was enlarged and the order in council included provisions whereby treaty Indians who had previously hunted and trapped the area were allowed to continue doing so. In addition, the

superintendent was given discretion to issue permits to individuals, other than treaty Indians who had previously hunted and trapped in the area. Subsequently these rights were made hereditary.

The reasons for the adoption of this policy in Wood Buffalo Park are readily understandable. The park itself was originally established to preserve the near-extinct wood bison, which under park regulations was protected even though other species could be hunted after 1926. In addition, the other criteria listed above were fulfilled and the loss of the resources of the park area would have imposed severe hardship on some 80 hunters and trappers who had previously depended on the area.

Because of the provision for trapping and hunting rights in Wood Buffalo Park, new regulations were drafted specifically for the park which were totally different from those applicable in all other parks. As a result of the granting of hereditary rights in the park, by the early 1970s some 600 persons were eligible to obtain permits. Concern developed amongst park management, hunters and the trappers themselves that game resources would be depleted by overhunting. As a result of cooperation between the hunters and trappers and park management, a trappers' association was established to regulate hunting and trapping activity in the park. In 1976, the association set a limit of 325 permits for the year, to be issued on the basis of need.

4.3.2 The Development of Cooperative Management

It is evident that government policy in the north generally recognizes that Indian title exists and that settlement of title claims will ultimately be negotiated. It is equally clear, however, that the native people of the north will not be satisfied with settlement of claims on the basis of cash payments such as were made in some areas of the south, but will demand a say in future development and management of the resources of the area. It is also evident that many of the native people also wish to continue to live in the traditional manner and would

like to see existing conditions preserved. Since preservation is the primary objective of establishment of national parks, it is suggested, development of schemes involving both groups in management of the resources is the natural solution.

Establishment of a national park has been put forward as a means of preserving one critical area on the Yukon north slope.[143] Plans proposed,[144] envisage Indian people undertaking a major role in management of parks under the terms of the proposal. It appears that in order to establish parks in the north the Parks Canada policies as applied to parks in southern Canada will probably have to be modified to allow a continuation of traditional hunting and fishing rights in the new parks. In effect, provided the hunting techniques remain the same, the new native people will merely fill a role in the natural system they have filled for at least 12,000 years. In addition, as was realized by the native hunters and trappers in Wood Buffalo Park, it is in the interest of the people themselves to develop internal regulatory control involving such things as quotas and permit issue to prevent over exploitation. The development of such regulatory systems is clearly a challenge which faces both Parks Canada and native people in areas where new parks are established. In such circumstances the establishment of parks appears to offer distinct advantages to the native people, who will retain the sole rights to harvest various natural resources in park areas free from competition of sports hunters.

4.3.3 The Data Base for Management

Under the existing management philosophy in southern parks, which involves the maximization of non-interference in development of climax systems, a low premium has been put on the collection of data to allow management under an extractive scheme. In February 1972 Jean Chrêtien, then Minister of Indian and Northern Affairs, stated:

> The creation of parks will not be permitted to affect in any way the traditional use of wildlife and fish resources by native people of the north.

Later, however, in a statement in 1974, he indicated that even traditional use would not be allowed to extinguish species, and that animal populations would be maintained at levels compatible with regulation at range carrying capacity. Clearly such sentiments are admirable, but quite impossible to apply without the basic data which would allow realistic quotas for kills to be set. It is suggested that as the first step in any future joint management scheme, is the collection of basic data relating to range productivity, population dynamics of hunted species and information related to the vast number of influences on natural systems which affect the potential harvest. It is pointed out that the issue of 325 permits in Wood Buffalo Park at the present time is a purely arbitrary figure, and it is quite feasible it represents a hunting and trapping pressure which the area cannot sustain. It is suggested therefore that whilst ultimately the native people may play an important part in managing the resources of northern parks, Parks Canada has an important role to play in collecting data, synthesizing them and providing management expertise in any management scheme which is ultimately established.

FOOTNOTES

1 (1973), 34 D.L.R.(3d) 145 (S.C.C.).

2 R.S.C. 1970, Appendices at pp. 127-129.

3 (1973), 42 D.L.R.(3d) 8.

4 R.S.C. 1970, CL-4, S. 154(1(b).

5 (1975) Chief Robert Kanatewat et al v James Bay Development Corporation et al (unreported).

6 For example the southeast Yukon and the Mackenzie valley.

7 See P.A. Cumming and Mickenberg N.H., 1972, Native Rights in Canada, Indian and Eskimo Association of Canada, Toronto, at p. 14.

8 Commentaries on the Laws of England. 4th ed. Vol. 1 Chicago: Callaghan & Co. 1889.

9 (1832) 31 U.S. 6(Pet) 390 at 391-392.

10 (1823) 21 U.S. at P. 253-254.

11 Report of the Commission Appointed to Investigate the Unfulfilled provisions of Treaty 8 and Treaty 11.

12 (1889) 14 App. Cas. 46 P.C.

13 In property law, the fee appears to be approximately the same as dominum.

14 Supra footnote 12.

15 Destruction of the resource.

16 J.V. Wright. (1972) Ontario Prehistory on 11,000-year archaeological outline. National Museums of Canada, Ottawa, 120 p.

17 Supra footnote 1.

18 Cumming, P.A., 1977 Native Rights in Northern Development IWGIA Document No. 26. Copenhagen.

19 Supra footnote 1.

20 For example, historical records indicate recognition of territorial boundaries by the Indians first encountered by the French in western Quebec and southern and eastern Ontario.

21 Supra footnote 10.

22 Supra footnote 1.

23 Lysyk, K. (1973) Canadian Bar Review, Vol. Ll at p. 403.

24 SC 1872, C23.

25 Order in Council No. 9 (1870) Reproduced R.S.C. 1970 supplement at page 257.

26 Quebec Boundaries Extension Act 1912 S.C. 1912 S.C. 1912 c.45.
Ontario Boundaries Extension Act 1912 S.C. 1912 c.40.

27 (1932) 2 W.W.R. 337.

28 (1964) 46 W.W.R. 65.

29 Supra at footnote 1.

30 (1975) 22 C.C.C. 155.

31 (1975) 5 W.W.R. 167.

32 R.S.C. (1970) c. 16.

33 Supra footnote 1.

34 Supra at footnote 28.

35 Supra footnote 31.

36 Supra at footnote 32.

36a Re Eskimos (1939) 104 S.C.R.

37 S.C. 1870 c. 3.

38 S.C. 1879 c. 31 S125(e).

39 Supra footnote 37.

40 Berger, T., The Mackenzie Valley Pipeline Inquiry, Vol. 1, Ottawa.

41 Report to The Hon. T.A. Crerar, Minister of Mines and Resources, reprinted in part in Cumming and Mickenberg. Supra footnote 7.

42 (1884), 1 Terr. L.R., 492 (N.W.T.S.C.).

43 (1900-1904), Terr. L.R. 301 (N.W.T.S.C.).

44 Supra footnote 40 at page 168.

44a This choice may be made explicitly, or as in the case of an Indian woman marrying a non-Indian, indirectly.

45 Supra footnote 7 at page 7.

46 Supra footnote 43.

47 Supra footnote 42.

48 Supra footnote 41.

49 Lysyk K., Alaska Highway Pipeline Inquiry, Ottawa.

50 Federal statutes such as the Migratory Birds Convention Act have been held to have precedence over treaty rights on a number of occasions, see for example Regina v George [1966] S.C.R. 267, Daniels v White and the Queen [1968] S.C.R. 517.

51 The effect of provincial statutes is somewhat uncertain in numerous cases see for example R v Jim (1915) 26 C.C.C. 236, (S.C.B.C.), R v McPherson (1971), 2 W.W.R. 640 (Man C.A.). More recently however in Cardinal v A.G.B.C. the Supreme Court of Canada held that part of the Alberta Wildlife Act which related to traffic in game meat was applicable to an Indian on the reserve. In effect the judgment indicated that the only thing the province cannot do is make law specifically for Indians.

52 Supra footnote 23 at P. 475.

52a Supra footnote 1.

52b (1975), 13 N.S.R. (2d) 460.

53 Supra footnote 7 at P. 81-83.

54 Supra footnote 7 at P. 84.

55 Supra footnote 7 at P. 85-88.

55a Supra footnote 131.

56 Supra footnote 26.

57 Supra footnote 26.

57a Posed on the basis that the Indian population of the area when Champlain arrived was totally different to that inhabiting the area when Cartier travelled down the Saint Lawrence nearly 100 years earlier.

57b Recently the Micmac Indians have advanced land claims in Newfoundland based on supposed aboriginal occupancy of the area. There appears however to be little support for such a claim in historical records, and it is probable that Micmac occupation of the St. George's Bay area is of relatively recent origin.

58 Treaty signed at Boston Massachusetts December 15th 1825. On file Archives Division, State House, Boston. Reproduced in Hurley D.M. Indian Land Rights in the Atlantic Provinces, National Museum of Canada, 1962.

59 Treaty No. 239, Indian Treaties and Surrenders volume II p. 198. Queens Printer 1912.

60 Indian Land Rights in the Atlantic Provinces, report prepared for National Museum of Canada, 1962.

61 Reproduced in Cumming and Mickenberg, supra footnote 7 at 307.

62 Proclamation of 1761, reproduced in Cumming and Mickenberg, supra footnote 7 at p. 285.

63 (1928) 50 C.C.C. 389.

64 Reproduced in Cumming and Mickenberg footnote 7, Appendix III at p. 307.

65 (1958) 43 M.P.R. 101.

66 (1975) 9 O.R. (2a) 524.

67 Supra footnote 65.

68 Supra footnote 58.

69 Supra footnote 58.

70 (1969 10 D.L.R. (3d) 179.

71 (1956) 43 M.P.R. 197.

72 Supra footnote 10.

73 An Act to Regulate the Management and Disposal of Indian Reserves in the Province S.N.B. 1854 c. 85.

74 Supra footnote 1.

75 Supra footnote 71.

75a See R.v. Isaac, Supra footnote 52b at p. 476.

76 Supra footnote 71.

77 Supra footnote 10.

78 See for example Cumming and Mickenburg 1972, p. 81-82.

79 Supra footnote 71.

80 For example by expropriation under Section 6(3) of the National Parks Act.

81 See the terms of various treaties contained in "Indian Treaties and Surrenders".

82 The Robinson treaties are reprinted by the Department of Indian and Northern Affairs in pamphlet form.

83 Supra footnote 82.

84 Ontario Prehistory, J.V. Wright, Ontario Museum of Man, 1972, 173 pp. Archaeological records indicate trade networks between Ontario and the Gulf of Mexico at least as early as 700 A.D.

85 The Voyages of Jacques Cartier, H.P. Biggar (translation) King's Printer 1924, p. 52. Cartier relates that one of his first encounters with Indians on the Coast of New Brunswick was motivated by Indian desire to trade furs.

86 1971 8 C.C.C. (2a) 569.

87 (1938) 2 W.W.R. 433.

88 (1968) 70 D.L.R. (2d) 77.

89 (1966) S.C.R. 267.

90 Published by the Queens Printer, Ottawa, 1912.

91 The uncertainty exists because of the existence of surrenders with uncertain boundaries.

91a (1966) 55 D.L.R. (2d) 386.

91b Morris, Hon. Alexander, The Treaties of Canada.

92 Ibid., at p. 29.

93 Supra footnote 7 at p. 122.

94 Notably a royal commission in 1959 found that Northwest Territories Indians had no concept of a division between land ownership and land use. Additionally, statements made at the time of signing some of the number treaties indicate that the Indians did not understand the terms, and signed only because the government was represented by persons they held in esteem. See for example Morris, Hon. A., Supra footnote 96b.

95 The terms do not violate the parol evidence rule since they are additional rather than contradictory.

96 B.N.A. Act, 1930, R.S.C. 1970, Appendix, No. 25 at pages 380-381.

97 This is consistent with the right of the federal Crown to regulate Crown lands under the terms of the number treaties.

98 (1969) 1 C.C.C. 299.

99 R.S.C. 1970, c. M-12.

100 Supra footnote 101.

101 (1978) 1 W.W.R. 282.

102 Supra footnote 104.

103 (1935) 2 W.W.R. 433.

104 Re Paulette (1973), 42 D.L.R. (3d) 8.

105 (1953) 8 W.W.R. 247.

106 (1976) 1 W.W.R. 196.

107 In R v. Ryder (1968) 70 D.L.R. (2d) 77 an Alberta Magistrates Court held that national park land was not unoccupied and therefore the National Parks Act was valid legislation regulating occupied land. It is suggested that the court in that case need not have found the land to be occupied in order to justify regulation under the terms of Treaty No. 4 and No. 7 cited in the case.

108 Daniels v. The Queen (1969) 1 C.C.C. 299.

109 Supra footnote 7 at P. 180.

110 (1965) 52 W.W.T. 193.

111 R.S.B.C. 1960 c. 160.

112 Supra footnote 2.

113 Supra footnote 23.

114 (1975) 22 C.C.C. 153.

115 S.B.C., 1966, c. 55, 5.4 as amended by S.B.C., c. 69, s.s. 3,4.

116 R.S.C. 1970 c. 1-6.

117 (1975) 4 W.W.R. 761.

118 (1963) 3 C.C.C. 109.

119 (1970) 10 D.L.R. (3d) 189.

120 Supra footnote 23 at p. 462 footnote 27.

121 Supra footnote 2.

122 Supra footnote 49.

123 Supra footnote 3.

124 (1964) 41 W.W.R. 65.

125 An Act for Regulating the Fur Trade and Establishing a Criminal and Civil Jurisdiction within certain parts of North America, I.S. 1821 c. 66.

126 Address to the Queen by the Senate and House of Commons, December 1867.

127 Dominon Lands Act S.C. 1872, c. 23.

128 Dominion Lands Act Amendment 62 and 63 Vict., c. 16, S.4.

129 Supra footnote 3.

130 7 and 3 Edw. VII, c. 20.

131 SC 1950, c. 22.

132 Published by the Department of Indian Affairs and Northern Development.

133 Supra footnote 49.

134 The COPE/Government Working Group, Joint Position Paper on the Inuvialuit Land Rights Claim. 1978 July.

135 Supra footnote 40.

136 R.S.C. 1970 c. N-13.

137 Suggested by the fact that the 1870 transfer agreement included terms stating the Dominion government, not the Hudson's Bay Company, would be responsible for settling Indian claims.

138 Imperial Order in Council No. 9 (1870) R.S.C. Revised Supplement No. 2 p. 257.

139 Supra footnote 3.

140 Supra footnote 7.

141 (1966) 56 W.W.R. 478.

142 R v. George (1966) 55 D.L.R. (2a) 386.

143 Supra footnote 40.

144 Supra footnote 134.

GLOSSARY OF TERMS

aboriginal right - right associated with occupation continuous since this immemorial

cession - surrender of the item involved (officer property)

ejusdem generis - rule of statutory interpretation requiring the general words applied to items of a specific class must be restricted to that class.

federal enclave - area of land for which the federal government holds the dominant estate lying within provincially controlled lands i.e. national parks, Indian reserves, military reserves, etc.

lex loci - law of the local inhabitants

terra incognita - land unknown at the time

ultra vires - beyond one's power or authority

usufruct - right to use and enjoy property without ownership of the property, short of destruction or waste of its substance.

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